

1992

The Counter-Reformation in Procedural Justice

Linda S. Mullenix

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The Counter-Reformation in Procedural Justice

Linda S. Mullenix¹

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INTRODUCTION

That is a novel method of amending rules of procedure. It subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules which shall be uniform throughout the country.

Judge Charles E. Clark, dissenting in *Arnstein v. Porter*²

Judge Clark must be rolling over in his grave.

In 1990, Congress enacted the Judicial Improvements Act,³ an omnibus bill that created ninety-four amateur rulemaking groups throughout the entire federal judicial system. In Title I, the Civil Justice Reform Act,⁴ Congress commanded these advisory groups to formulate civil justice expense and delay reduction plans by the end of 1993.⁵ In addition, Congress ordered the Judicial Conference to designate ten federal courts as pilot districts, which were required to expedite their reform plans and complete them by December 31, 1991.⁶ In the Judicial Im-

2. 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting). Judge Clark was referring to the majority decision, which reversed an order granting defendant's motion for summary judgment in a copyright infringement case. *Id.* at 475. Judge Clark was the Reporter of the Committee that drafted the Federal Rules of Civil Procedure, promulgated in 1938. He subsequently served as the first Reporter to the Advisory Committee on the Civil Rules. See generally Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (describing Judge Clark's participation in the drafting and promulgation of the Federal Rules).

3. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 28 U.S.C.); see also S. REP. NO. 416, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6852; H.R. REP. NO. 732, 101st Cong., 2d Sess. 11 (1990).

4. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Judicial Improvements Act also created seventy-seven new federal district and circuit court judgeships. 28 U.S.C. § 133 (Supp. II 1990).

5. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

6. See *id.* at § 105(b)(1); see also Memorandum from The Hon. William B. Schwarzer to All Chief Judges, U.S. District Courts (Jan. 16, 1991) (on file at the Federal Judicial Center and the *Minnesota Law Review*). The Judicial

provements Act, Congress served notice that it was going to have civil justice reform and have it immediately.

The Civil Justice Reform Act of 1990 is fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938.⁷ The Act mandates local, grassroots rulemaking by civilian advisory groups, a novel process that essentially circumvents the usual judicial advisory committee system for civil procedure rule reform that has been in place since 1938.⁸ In this respect alone the Act is revolutionary.

It would be difficult to overstate the Act's importance. Superficially, the various local rule reforms that individual districts recommend will be of great interest and significance to litigants, their lawyers, and the general public. The civil justice reform plans published and implemented by the various districts will generate a large body of commentary and debate.⁹

Conference's Committee on Court Administration and Case Management has primary oversight responsibility for implementation of the Act and a subcommittee developed criteria for selection of the ten pilot district courts. The full committee met on January 3-4, 1991, and approved the subcommittee's recommendations for ten pilot districts. The statute required that at least five of the ten designated pilot districts encompass metropolitan areas. See Civil Justice Reform Act § 105(b)(2), 28 U.S.C. § 471 note (Supp. II 1990). The ten designated pilot districts are: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS 1 (June 1, 1992) [hereinafter CIVIL JUSTICE REFORM ACT REPORT].

7. See Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 167 (1992). Portions of the ensuing text are adapted from this article and reprinted by permission.

8. For a description of the rulemaking process, see generally *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1958); WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 1-35 (1981); Howard Lesnick, *The Federal Rule-Making Process, A Time For Re-examination*, 61 A.B.A. J. 579 (1975); Judge Albert B. Maris, *Federal Procedural Rulemaking: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797-802, 830-43 (1991); Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 66 JUDICATURE 280 (1979).

9. There is already a significant amount of commentary on various plans. See, e.g., *Federal District Court Names Advisory Group*, MASS. L. WKLY., Feb. 4, 1991, at 3 (discussing creation of Massachusetts Advisory Group under Civil

The true significance of the Civil Justice Reform Act, however, does not lie in the nuts and bolts of procedural reform. It is not in whether local districts enact a mandatory disclosure rule,¹⁰ institute early neutral evaluation programs,¹¹ or require recourse to alternative dispute resolution (ADR) techniques.¹²

Justice Reform Act); Mary Hull, *"Jiffy Justice" May Become The Norm*, TEX. LAW., July 22, 1991, at 1 (discussing impact of the Civil Justice Reform Act on Texas's four judicial districts); Adrienne C. Locke, *Civil Justice Reform Bill Expected to Cut Costs*, BUS. INS., Nov. 5, 1990, at 2 (discussing Civil Justice Reform Act and creation of pilot districts); Carl Tobias, *Justice Stays Civil in Montana*, LEGAL TIMES, Nov. 25, 1991, at 20 (discussing Civil Justice Reform Act report and plan in Montana); Daniel Wise, *Eastern District Panel Proposes Measures to Speed Civil Cases*, N.Y. L.J., Sept. 4, 1991, at 1 (discussing report and plan for the Eastern District of New York).

10. See 28 U.S.C. § 473(a)(2)(C) (Supp. II 1990). For examples of mandatory disclosure rules see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., REPORT AND PLAN (1991) (rule requiring exchange of core information); U.S. DIST. COURT FOR THE DIST. OF DEL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 23, 1991) (automatic disclosures in personal injury, malpractice, RICO, and employee civil rights cases); CIVIL JUSTICE ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF ILL., REPORT AND PLAN (1991) (automatic disclosures prior to discovery in all cases); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., REPORT TO HON. THOMAS C. PLATT, CHIEF JUDGE (Oct. 22, 1991) (automatic disclosure prior to discovery for all filings for 18 month test period; new rule to correspond with proposed Federal Rule 26); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, REPORT AND RECOMMENDATIONS (Nov. 1, 1991) (mandatory discovery in pro se prisoner cases); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF OKLA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, REPORT (Oct. 21, 1991) (mandatory disclosure for all cases; new rule to correspond with proposed Federal Rule 26); U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 20, 1991) (duty of disclosure under three delineated management tracks); and CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, and CIVIL JUSTICE ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Oct. 24, 1991) (voluntary disclosure modelled on proposed Federal Rule 26 on trial basis in 10-20 cases per judge).

11. See 28 U.S.C. § 473(b)(4) (Supp. II 1990). For examples of such programs see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10 (court-annexed early neutral evaluation program); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., *supra* note 10 (court-annexed early neutral evaluation; pro bono); and ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF OHIO, REPORT AND PLAN (1991) (court-annexed early neutral evaluation, mediation, non-binding arbitration).

12. See 28 U.S.C. § 473(a)(6) (Supp. II 1990). For examples see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10 (court-annexed non-binding arbitration); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF GA., REPORT AND PLAN (1991) (court-annexed arbitration); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF MICH., REPORT AND PLAN (1991) (arbitration referrals); ADVISORY GROUP OF

Commentators who analyze and debate the narrow merits of specific local reform measures will miss the crucial importance of the Act. To date, almost everyone who has considered the Act has mistakenly focused on the nuts and bolts.¹³

The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act.¹⁴ Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for the federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.¹⁵

The implications of this unheralded revolution will be dramatic and widespread for years to come. At the most pragmatic level, the grassroots local advisory groups are destined to create problematic local rules, measures, and programs. Although this "bottom up" approach to rulemaking is theoretically laudable, it can also be viewed as a politically cynical way of magically conferring a democratic patina on a rulemaking process that is not truly locally inspired, but federally orchestrated by Washington.¹⁶ Furthermore, local amateur rulemaking groups, how-

THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., *supra* note 10 (court-annexed arbitration and mediation); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 10 (mandatory court-annexed mediation for all expedited cases and sample of other cases pro bono); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF OHIO, *supra* note 11 (extensive ADR program with ADR administrator to oversee program); and CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE W. DIST. OF TENN., REPORT (Sept. 26, 1991) (local rule amended to authorize ADR referrals).

13. See, e.g., sources cited *supra* note 9.

14. See 28 U.S.C. § 2072 (1988 & Supp. II 1990).

15. See Mullenix, *supra* note 8, at 801-02 (predicting demise of the Advisory Committee on Civil Rules's influence on the rulemaking process for reasons unrelated to the Civil Justice Reform Act).

16. See 28 U.S.C. § 473 (Supp. II 1990). This section provides a detailed list of recommended procedural innovations that the local advisory groups are instructed to consider in developing the content of their civil justice reform plans. In addition, local advisory groups have received multiple memoranda from the Federal Judicial Center with proposals for procedural rules. See, e.g., Memorandum from The Hon. William B. Schwarzer to All Chief Judges, U.S.

ever intelligent, diligent, and well-intentioned, are ill-equipped to perform the basic tasks the Act requires, such as conducting docket assessments¹⁷ and evaluating the reasons for cost and delay in the district.¹⁸ Bad social science will form the basis for bad rulemaking.

This vast experiment in local rulemaking will undermine the procedural reform that promulgation of the federal rules effected in 1938. Judge Clark aptly captured the aesthetic¹⁹ of that first procedural reformation in his *Arnstein* dissent: careful, informed study that leads to the adoption and amendment of simple rules that are uniform throughout the country. The reforms the Civil Justice Reform Act mandates are not conducive to careful, informed study of the Federal Rules of Civil Procedure. Further, it is doubtful that the Act's requirements will lead advisory groups to recommend simple rules. Instead, with its statutory emphasis on increased judicial management of litigation, the Act encourages (if not requires) a proliferation of increasingly complex and specific local rules.

The Civil Justice Reform Act is at war with the concept of uniform procedural rules throughout the federal district courts. The Act instead directly contributes to an increased balkanization of federal civil procedure, a process that began with Federal Rule of Civil Procedure 83, which authorizes the creation of local rules.²⁰ What began as an aesthetic of procedural simplicity has been transformed, over fifty years, into a reigning reality of procedural complexity. Today, federal practice and procedure is impossibly arcane.

A federal practitioner must now know, in addition to the Federal Rules of Civil and Appellate Procedure, the existing local rules of ninety-four district courts and eleven federal cir-

District Courts *supra* note 6; Memorandum from the Judicial Conference of the United States to Chief Judges, United States District Courts (March 4, 1991) (on file with the *Minnesota Law Review*). The Advisory Group for the Southern District of Texas also received copies of Vice President Quayle's A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA [Hereinafter AGENDA FOR CIVIL JUSTICE REFORM] (Gov. Printing Office, Aug. 1991), during the course of their deliberations. See *infra* notes 33-37 and accompanying text discussing Vice President Quayle's Report.

17. 28 U.S.C. § 472(c)(1) (Supp. II 1990). The advisory groups have been directed to assess the condition of both civil and criminal dockets.

18. *Id.* § 472(c)(1)(C), (D).

19. See generally Janice Toran, *'Tis A Gift To Be Simple: Aesthetics And Procedural Reform*, 89 MICH. L. REV. 352 (1990) (describing the underlying philosophy of the Federal Rules of Civil Procedure as enacted in 1938).

20. See FED. R. CIV. P. 83.

cuits.²¹ The practitioner simply cannot know the procedures of any other federal district without looking them up, just as an out-of-state practitioner must research the rules of a foreign jurisdiction. As a consequence of the Act, the practitioner's life will now be further complicated by the overlay of new rules, measures, and programs promulgated and implemented on the recommendation of ninety-four local advisory groups.

Incredibly, in addition to all this procedural babel,²² the Federal Advisory Committee on Civil Rules remains in existence, currently drafting further revisions to the general federal rules,²³ a task that parallels the work of the local advisory groups. With regard to the proliferation of rulemakers, one is reminded of the old Abbott and Costello joke "Who's on first?" Whatever may be said for the democratic process, it should be abundantly clear to any observer of the rulemaking scene that there are now too many procedural cooks. What the relationship among all these rulemaking bodies and their resulting rules will be poses an interesting academic question. For the average lawyer and potential federal litigant, however, what procedural rules govern in any given federal court is a pointed real-life dilemma. Procedural rules govern court access, shape

21. See generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989) (discussing history and current state of local rules). As Professor Subrin and his colleagues have demonstrated, local rules may or may not be consistent with the general federal rules of civil procedure. Cf. A. Leo Levin, *Local Rules As Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (approving of Rule 83's creation of "local laboratories" for new rules).

22. Professor Maurice Rosenberg, in congressional testimony, was apparently the first to use the Tower of Babel metaphor for local rules. See Levin, *supra* note 21, at 1569 n.5 (citing HOUSE COMM. ON THE JUDICIARY, RULES ENABLING ACT OF 1985, H.R. REP. NO. 422, 99th Cong., 1st Sess. 15 n.55 (1985)).

23. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE (Aug. 1991); see also Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time For Reform?*, 138 F.R.D. 155 (1991) (questioning desirability of proposed discovery rule revisions); Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1 (discussing withdrawal of proposed discovery rule modifications); Economic Studies Program and the Center for Public Policy Education, Project Proposal, The Future of Jury-Based Litigation in the United States (July 1991) (joint proposal of the Brookings Institution and the Litigation Section of the American Bar Association to reform the jury trial system) (on file with the *Minnesota Law Review*).

the structure of lawsuits, and significantly influence the course of pretrial proceedings.

Finally, the Act authorizes unconstitutional rulemaking, violates the separation of powers doctrine, and arrogates to Congress unprecedented authority over federal procedure. The Civil Justice Reform Act should be understood as an alarming intrusion by Congress—made without adequate legal or empirical foundation—into the judiciary's internal housekeeping affairs. This intrusion strips the judicial branch of its important function of procedural rulemaking. Unless and until the Civil Justice Reform Act is challenged as an unconstitutional delegation of rulemaking authority, federal courts will be subjected to varying popular local whims relating to court access and procedure.

My thesis is simple: The Civil Justice Reform Act revokes the Rules Enabling Act and authorizes unconstitutional rulemaking. The Act violates the separation of powers doctrine and substantially impairs the ability of the federal courts to control their internal processes and the conduct of civil litigation. Congress is simply wrong in declaring that it has exclusive federal rulemaking power. What Congress has taken from the judiciary in the rulemaking process the federal courts should take back, before federal rulemaking and civil litigation become irretrievably balkanized and politicized.

The legal dimensions of this thesis, dealing with the constitutional basis of the Civil Justice Reform Act, the statutory limits of the Rules Enabling Act, and separation of powers doctrine, are developed in a companion article that appears later in this Volume of the *Minnesota Law Review*.²⁴ The present Article, which lays the factual groundwork for demonstrating the legal insufficiency of the Act, has a two-fold purpose: it captures the Act's radical nature and the counter-reformation in procedural justice it represents, and describes the legislative process that led to its enactment.

This Article is divided into three Parts. Part One, which briefly narrates recent efforts at civil justice reform throughout all branches of the federal government, views the Act as one dimension of a political agenda which seeks to impose a certain vision of procedural justice at the federal level. This portion of the Article describes the Civil Justice Reform Act, its empirical

24. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, planned for 77 MINN. L. REV. __ (June, 1993).

and political foundations, and the requirements it imposes for accomplishing civil justice reform in all federal district courts. It also assesses the potential impact of the procedural innovations that local advisory groups must consider under the Act in formulating civil justice reform plans and evaluates whether their resulting implementation will accomplish the civil justice goals Congress envisioned.²⁵

Part One also describes the Act's various requirements to show the extensive rulemaking authority that Congress delegated to local advisory groups and the kinds of tasks the Act requires the advisory groups to accomplish in formulating their plans. This demonstrates the widespread dispersal of procedural rulemaking to local amateur groups and the serious effects this dispersal is likely to have on access to federal courts and on federal litigation practice. In addition to setting forth the Act's varied requirements, this Part also indicates the haste with which Congress acted on this major piece of legislation and reveals the lack of reasoned debate surrounding its enactment. The purpose of this discussion is to illustrate the paucity of meaningful discussion surrounding the Act's drafting and to display how Congress debates, or rather fails to debate, important issues of constitutional law.

Part Two examines the legislative history relating to Congress's consideration of its constitutional authority to enact the Civil Justice Reform Act and further delegate the procedural rulemaking function to local advisory groups. Part Two focuses on the lack of serious, considered discussion of the constitutional and statutory limits of congressional rulemaking authority. Despite opposition from the Judicial Conference of the United States Courts and skepticism of the American Bar Association and the Department of Justice, Congress concluded that it had exclusive rulemaking authority. This Part argues that

25. This section focuses on the legislation, rather than providing a detailed analysis of the plans and reports. For examples of articles addressing plans and reports, see Robert Elder, Jr., *Congress Catches Heat For Federal Court Woes; Texas Districts Want More Money, Less Meddling*, TEX. LAW., Jan. 27, 1991, at 4 (detailing reports and plans of Texas district courts under Civil Justice Reform Act); Gordon Hunter, *Judges Clog Federal Docket; Bench Trial Rulings, Pending Motions Pile Up in Texas Courts*, TEX. LAW., Nov. 18, 1991, at 1 (early assessment of district court judicial performance statistics required under Civil Justice Reform Act); and Christine E. Sherry, *Section Forms Task Force on Civil Justice Reform Act*, 17 LITIG. NEWS, Dec. 1991, at 1 (reporting on ABA litigation section's creation of task force to study and evaluate civil justice reports and plans completed under the Civil Justice Reform Act). See also sources cited *supra* note 9.

Congress usurped procedural rulemaking authority, transgressed the Rules Enabling Act, and ignored the separation of powers doctrine.

Part Three discusses the sources of congressional authority articulated by the Senate Judiciary Committee to enact the Civil Justice Reform Act. This Part questions the strength of each rationale as a matter of legal theory, practice, and policy. It suggests that congressional arguments based on the ideological rhetoric of participatory democracy do not support the delegation of rulemaking authority to local, non-expert advisory groups.

Using this Article's factual background, the companion Article will address constitutional and statutory problems relating to the Civil Justice Reform Act. It will discuss the underlying theory of rulemaking allocation embodied in the Rules Enabling Act and the doctrinal precedents construing that statute. It will also analyze the separation of powers doctrine as it relates to the allocation of substantive and procedural rulemaking authority between the legislative and judicial branches.

The combined thesis of this Article and the companion piece is that the Rules Enabling Act must be read to allocate procedural rulemaking authority to the judicial branch. Under no circumstances can that Act be read to confer procedural rulemaking authority exclusively on Congress. Congress, therefore, has overruled, *sub silentio*, the Rules Enabling Act through the Civil Justice Reform Act. The Senate's interpretation of the Rules Enabling Act inverts the usual understanding of that Act, and transforms it from enabling to disabling legislation. Further, this attempt to strip the judicial branch of its procedural rulemaking authority under the guise of "substantive effects" violates the separation of powers doctrine, which commits control over internal court housekeeping affairs, including the promulgation of procedural rules, to the judiciary.

Although this Article centers on the factual bases underlying the Civil Justice Reform Act and its companion Article deals with constitutional and statutory arguments relating to allocation of civil procedure rulemaking authority, this Article ends with some brief observations as to why, as a matter of policy, procedural rulemaking authority ought to be vested in the judicial, rather than the legislative, branch. It therefore revisits the overarching theory of the Federal Rules of Civil Procedure, as well as the debate surrounding the relative fairness, compe-

tency, and efficiency of the respective bodies to promulgate procedural rules.

This Article concludes that the Act ought to be repudiated as a noble but ill-conceived piece of legislation that will produce more harm than good for civil justice in this country. Civil procedural rulemaking ought not to be in the hands of ninety-four local amateur rulemaking groups who are destined to wreak mischief, if not havoc, on the federal court system. Procedural rulemaking should be restored to the federal judiciary, to be accomplished in slow and deliberative fashion by procedural experts through the existing Advisory Committee system.

I. UNDERSTANDING THE CIVIL JUSTICE REFORM ACT OF 1990²⁶

The Civil Justice Reform Act must be understood against a backdrop of the civil justice reform efforts that percolated through all three branches of the federal government during the late 1980s. This understanding is important because one of the Act's stated purposes, according to its legislative history, is to achieve justice from the "bottom up," from the "users" of the system.²⁷ The Act, as a matter of public relations, carries with it a strong gloss of participatory democracy and civic do-goodism that is belied by a highly centralized effort to impose a certain set of procedural reforms onto the civil justice system. Thus, it is but one piece of an entire federal civil justice reform agenda, consisting of virtually identical proposals, that has been advanced in all three branches of government. Rather than coming from the bottom up, this forced effort to accomplish speedy civil justice reform is actually being pushed from the top down.²⁸

26. See *supra* note 7.

27. See S. REP. NO. 416, *supra* note 3, at 14, reprinted in 1990 U.S.C.C.A.N. at 6817.

The broad membership of the planning groups and the overall planning group mechanism outlined in the legislation will ensure that the entire litigating community share in the development of the plans. As Judge Enslen pointed out, "if the user committee assists in drafting the plan, the users of the system are going to be all the more interested in following it."

Id. at 15, reprinted in 1990 U.S.C.C.A.N. at 6818 (citation omitted); see also 136 CONG. REC. S416 (daily ed. Jan. 25, 1990) (statement of Sen. Biden); Jeffrey J. Peck, "Users United": The Civil Justice Reform Act of 1990, 54 LAW & CONTEMP. PROBS., Summer 1991, at 105, 109-10 (discussing Sen. Biden's statement). Mr. Peck is the staff director for the Senate Judiciary Committee and played a major role in shepherding the Civil Justice Reform Act into law.

28. Compare Deborah R. Hensler, *Taking Aim at the American Legal Sys-*

The legislative branch, through the Civil Justice Reform Act, is requiring seemingly precipitous and urgent reform based on a largely assumed crisis in the civil justice system.²⁹ The Act reflects congressional frustration with the glacial pace of procedural reform as accomplished through deliberative judicial rulemaking,³⁰ and demonstrates congressional demand for immediate procedural justice reform without regard to statutory niceties or constitutional separation of powers problems.³¹

tem: The Council on Competitiveness's Agenda for Legal Reform, 75 JUDICATURE 244 (1992) (criticizing the centralized reform movement) with Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992) (supporting Vice President Quayle's reform proposals).

29. See Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990) (congressional findings). It is significant to note that the six "findings" reported by Congress rest on the unproven assumption that cost and delay is a problem in all federal district courts. In none of its findings did Congress ever document that there actually is a threshold problem of cost and delay. Thus, Congress declared:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

Id.

30. See Peck, *supra* note 27, at 114-16.

31. See *id.* Mr. Peck writes:

Regrettably, . . . this battle over turf *should* not and need not have occurred. It should not have occurred because the view that

The executive branch, not content with the pace of reform through congressional legislation, simultaneously pushed various procedural reform initiatives. An October 1991 Presidential Executive Order imposed reforms similar to those of the Civil Justice Reform Act on all executive branch departments and agencies.³² Vice President Quayle's infamous August 1991 attack on the legal profession³³ was based on a report from the

court reform is somehow within the exclusive province of the courts is erroneous as a matter of law and mistaken as a matter of policy when, as here, the rulemaking process had not fully responded to the range of civil litigation problems that existed. . . .

....

... What largely remained, then, was an objection to the congressional involvement in procedural reform that the bill represented. As a matter of constitutional law, this argument, which is often cloaked in separation of powers terms, is without merit.

Id. at 114.

32. See Exec. Order No. 12,788, 56 Fed. Reg. 55,195 (1991); see also Marshall J. Breger, *Lawyers Must Lead the Way*, NAT'L L.J., Nov. 18, 1991, at 15 (commenting on Exec. Order No. 12,788 as it relates to civil justice reform in federal agencies); Theodore Olson, *Top-Down Civil Justice Reform*, TEX. LAW., Feb. 17, 1992, at 16 (discussing Exec. Order No. 12,788).

33. See Text of Address by Vice President Dan Quayle at the Annual Meeting of the American Bar Association, Atlanta, Georgia, FED. NEWS SERVICE, Aug. 13, 1991 available in LEXIS, Nexis library, Fednew file. Vice President Quayle's speech has permeated the media. See, e.g., *Bashing Lawyers*, *Also Justice*, N.Y. TIMES, Feb. 15, 1992, at 22 (responding negatively to Quayle's speech); Andrew Blum, *ABA Takes Softer Stand on Quayle*; *Upset Staffers*, NAT'L L.J., Oct. 14, 1991, at 3 (discussing reaction to Quayle's ABA speech on civil justice reform); Steven Brostoff, *Push by Bush Urges on Tort Reform Movement*, PROP. & CASUALTY/EMPLOYEE BENEFITS EDITION, Sept. 2, 1991, at 5 (discussing reaction to Quayle's speech and tort reform movement); Dawn Ceol, *Quayle Urges Reform of Civil Justice System*, WASH. TIMES, Aug. 14, 1991, at A4 (reporting Quayle's speech); Rupert Cornwell, *U.S. Plans Radical Legal Reforms*, THE INDEPENDENT, Aug. 14, 1991, at 10 (reporting Quayle's speech); *The Costs of Lawyering*, CHRISTIAN SCI. MONITOR, Aug. 19, 1991, at 20 (reacting positively to Quayle's speech); *First, Sock the Lawyers*, 23 NAT'L J. 2041 (Aug. 17, 1991) (reporting on Quayle's speech); Mary Jane Fisher, *Civil Justice Reform Plan Introduced by VP Quayle*, PROP. & CASUALTY/EMPLOYEE BENEFITS EDITION, Aug. 19, 1991, at 1 (discussing reaction Quayle's speech and support from insurance groups); *For the Record*, WASH. POST., Aug. 15, 1991, at A20 (quoting excerpts from Quayle's speech to ABA); Milo Geyelin, *Quayle's Data in Proposed Reform of Legal System Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7 (discussing criticism of empirical data in Quayle's speech); Milo Geyelin, *Quayle Faces Powerful Foes on Law Reform*, WALL ST. J., Dec. 12, 1991, at B1 (reporting on the emerging corporate opponents of Quayle's proposals); Geoffrey C. Hazard Jr., *Bush Report Not All That Controversial*, NAT'L L.J., Dec. 16, 1991, at 13 (commenting on the limited scope of Quayle's proposals); Julie Johnson, *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54 (noting pro-business bias of proposed Quayle's reform efforts); David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1 (reporting on Quayle's speech and opposition to proposals); *Quayle Outlines Recommendations for Reforming*

President's Council on Competitiveness, entitled *Agenda for Civil Justice Reform in America*,³⁴ that contained substantially the same package of procedural reforms set forth in both the Civil Justice Reform Act and the President's Executive Order on civil justice reform.³⁵

Indeed, it is striking that similar, if not identical, recommendations concerning civil litigation had been advanced in all three branches of government in the early 1990s. The proposals focus on tighter managerial control over pre-trial proceedings, curbing discovery abuse, and mandatory recourse to alternative dispute resolution techniques; some make recommendations regarding further control over attorneys' fees and punitive damages.³⁶ These proposals raise interesting problems relating to party autonomy, managerial judging, access to federal courts, and the right to adversarial dispute resolution.³⁷

A. BACKGROUND AND POLICY

Two signal events occurred in 1990 regarding the delivery of civil justice in the United States federal court system. First, the Federal Courts Study Committee, a group of lawyers and lay persons Chief Justice Rehnquist appointed at the direction of Congress to study the problems of the federal courts, issued the *Report of the Federal Courts Study Committee*.³⁸ At the outset, the *Report* noted that in authorizing the study, Congress was responding to "mounting public and professional concern with the federal courts' congestion, delay, expense, and expan-

Product Liability, 53 WKLY. BUS. AVIATION, Aug. 19, 1991, at 74 (reporting on Quayle's speech and products liability tort reform); Greg Rushford, *Touting Tort Reform*, LEGAL TIMES, Sept. 2, 1991, at 5 (reporting on favorable responses to Quayle's speech); Martin Scram, *Call it Danforth in the Lawyers' Den*, NEWSDAY, Aug. 29, 1991, at 126 (reacting favorably to Quayle's speech); *Taking the Lead*, NAT'L L.J., Nov. 4, 1991, at 12 (reacting positively to Quayle's speech); Roush Vance, *New Bar Chief Wants to Boost Image of Attorneys and Promote Professionalism*, MICH. L. WKLY., Sept. 23, 1991, at S3B (reporting comments at Michigan State Bar meeting on Quayle's speech and decline in professionalism).

34. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 16; see also Avern Cohn, *Civil-Justice Report Flawed*, LEGAL TIMES, Sept. 23, 1991, at 28 (letter to the editor criticizing Quayle's speech and the AGENDA FOR CIVIL JUSTICE REFORM).

35. See AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 16.

36. See e.g., *id.* at 32 (discussing punitive damages); Exec. Order No. 12,788, 56 Fed. Reg. 55,197 (1991) (discussing fees and expenses in § 1(h)).

37. These important topics are largely outside the scope of this Article. For a description of some of the problems with the Quayle proposals, see Hensler, *supra* note 28.

38. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990).

sion."³⁹ The product of fifteen months work, the *Report* comprehensively described the state of the federal judiciary, analyzed problems besetting the federal court system, and proposed a set of detailed recommendations for reforming judicial administration and federal procedure.⁴⁰

Second, the Brookings Institution Task Force on Civil Justice Reform issued its report, *Justice for All: Reducing Costs and Delays in Civil Litigation*.⁴¹ At Senator Joseph R. Biden, Jr.'s request, the Brookings Institution had assembled a seemingly diverse task force⁴² that met over a two-year period to discuss problems of civil justice. In contrast to the Federal Court Study Committee's *Report*, the Brookings-Biden report focused more narrowly on civil litigation. It contained a series of sweeping recommendations for reform of the civil justice system.

The Brookings-Biden report provided the basis for Title I of the Judicial Improvements Act of 1990,⁴³ the Civil Justice Reform Act of 1990.⁴⁴ The Act requires every federal district

39. *Id.* at 3.

40. *Id.* at 3-28 (overview); cf. Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990) (findings); 28 U.S.C. § 473 (Supp. II 1990) (content of civil justice expense and delay reduction plans).

41. BROOKINGS INST., *JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION* (1989).

42. The task force represented varying interests within the civil justice system, including "plaintiff's and defense bar, civil and womens' rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors." *Id.* at vii; see also S. REP. NO. 416, *supra* note 3, at 13, reprinted in 1990 U.S.C.C.A.N. at 6816 (discussing the task force). Despite the apparent diversity of the task force, its membership was heavily weighted with corporate and insurance interests. See BROOKINGS INST., *supra* note 41, at 45-49 (listing members of the task force and their affiliations).

43. See *supra* note 3.

44. Civil Justice Reform Act of 1990, Pub. L. No. 101-650 §§ 101-105, 104 Stat. 5089-98 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). See generally Mark Ballard, *Bill to Add U.S. Judges Shortchanges Texas by 6; Legislation Would Add 3 New Courts in Southern District, 1 in Western District*, TEX. LAW., June 18, 1990, at 4 (commenting on earlier version of the bill); *Biden Introduces Court Reform Bill*, WASH. TIMES, Jan. 26, 1990, at A2 (announcing of Civil Justice Reform Act); David Bauman, *Biden Unveils Litigation Bill*, GANNETT NEWS SERVICE, Jan. 25, 1990, available in LEXIS, Nexis Library, GNS File (discussing Biden bill); Marcia Coyle & Marianne Lavelle, *Conference O.K.'s Plan to Cut Court Costs, Delays*, NAT'L L.J., May 21, 1990, at 5 (noting Judicial Conference opposition to Civil Justice Reform Act and setting forth conference's own proposals); Marcia Coyle & Fred Strasser, *Senate Sets its Sights on Delays in Civil Trials*, NAT'L L.J., July 23, 1990, at 5 (discussing Biden bill and noting opposition from the Judicial Conference of the United States Courts and the American Bar Association); Stephen Labaton,

across the country to develop and implement a civil justice plan to reduce costs and delay within the district.⁴⁵ The legislative history indicates that the central purpose of the Civil Justice Reform Act is to accomplish the often stated but frequently unachieved goal of Rule 1 of the Federal Rules of Civil Procedure: to ensure the "just, speedy, and inexpensive determination" of civil disputes in federal courts.⁴⁶ The legislative history notes that "[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers."⁴⁷

Congress suggested that the federal courts "are suffering today under the scourge of two related and worsening plagues."⁴⁸ The first—high costs of litigation and delays that contribute to high costs—limits access to federal courts to only the wealthy and lessens the ability of American corporations to compete at home and abroad.⁴⁹ The second—a scarcity of fi-

Business and the Law; Biden's Challenge to Federal Courts, N.Y. TIMES, Apr. 16, 1990, at D2 (reporting on Civil Justice Reform Act and opposition from Federal judges); *Legislation: Mixed Bag of Changes Designed to Improve Federal Practice*, 59 U.S.L.W. 2419 (January 15, 1991) (describing provisions of Judicial Improvements Act of 1990); Peck, *supra* note 27, at 107-09 (discussing the history of the Act); *Proceed with Caution*, NAT'L L.J., Mar. 8, 1990, at 6 (criticizing Brookings Report and Civil Justice Reform Act); Richard A. Rothman, *Civil Justice Reform Act: Too Little, Too Fast*, N.Y. L.J., Apr. 17, 1990, at 2 (noting early criticism of Civil Justice Reform Act).

45. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

46. FED. R. CIV. P. 1. Echoing this trilogy of values, the Senate legislative history of the Civil Justice Reform Act states that the purpose of the legislation "is to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts." S. REP. NO. 416, *supra* note 3, at 1, reprinted in 1990 U.S.C.C.A.N. at 6804.

Although Congress, in the legislative history, identified three fundamental values, the Civil Justice Reform Act itself focuses exclusively on two: cost and delay. The independent value of justice is absent from the statutory mandate, and by inference, it must be assumed that Congress equated reducing cost and delay with achieving justice.

The lack of a definition of justice, or any further reference to justice in the legislation supplying the framework for civil justice reform disturbed some members serving on advisory groups, as well as judges interviewed during the course of evaluating conditions in the districts. See Mullenix, *supra* note 7, at 199; see also CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at B-5.

47. See S. REP. NO. 416, *supra* note 3, at 1, reprinted in 1990 U.S.C.C.A.N. at 6804.

48. *Id.*

49. *Id.* at 1-2, reprinted in 1990 U.S.C.C.A.N. at 6804. The theme that civil

nancial resources dedicated to the federal court system—results in a shortage of federal judges. This shortage, in turn, increases costs and results in delay, especially in federal courts with congested criminal dockets and high drug-related caseloads.⁵⁰

The Civil Justice Reform Act is intended to address these two problems in what Congress deemed a “comprehensive and straightforward fashion.”⁵¹ Six cornerstone principles animate this legislative program:

- (1) building reform from the ‘bottom up’;
- (2) promulgating a national, statutory policy in support of judicial case management;
- (3) imposing greater controls on the discovery process;
- (4) establishing differentiated case management systems;
- (5) improving motions practice and reducing undue delays associated with decisions on motions; and
- (6) expanding and enhancing the use of alternative dispute resolution.⁵²

The Senate Judiciary Committee ultimately recast these six principles as the findings supporting Title I of the Civil Justice Reform Act.⁵³ As a result of these findings, Congress has required each federal district court to promulgate a “civil justice expense and delay reduction plan.”⁵⁴

Congress made two key policy decisions regarding civil justice reform within the federal system. The first was that reform is to be accomplished locally, based on the recommendations of district-wide community advisory groups, including not only federal court personnel, but also lawyers and clients—“those who must live with the civil justice system on a regular basis.”⁵⁵ This decision recognized the “remarkable

justice reform is needed to combat decreased American competitiveness in the global economy underlies Vice President Quayle’s address to the American Bar Association and the AGENDA FOR CIVIL JUSTICE REFORM. *See supra* notes 33-34.

50. *See* S. REP. NO. 416, *supra* note 3, at 1-2, *reprinted in* 1990 U.S.C.C.A.N. at 6804.

51. *Id.*

52. *Id.* at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817; *see also* Peck, *supra* note 27, at 109-12 (describing the cornerstone principles of the legislation and their translation into statutory mandates to the advisory groups).

53. *See* Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990).

54. 28 U.S.C. § 471 (Supp. II 1990).

55. 136 CONG. REC. S416 (daily ed. Jan. 25, 1990) (statement of Sen. Biden). This policy decision was based on a recommendation from the Brookings Institution, cited in the Act’s legislative history: “[T]he wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, bar, and client

number of gifted and talented" personnel within the local federal districts, as well as the idea that people involved in reform efforts will have a greater interest in carrying out the reform.⁵⁶

The second decision, tied to decentralized reform, was to promulgate a national, statutory policy in support of judicial case management more extensive than what the current federal rules require.⁵⁷ This decision was predicated on the conclusion that early and increased judicial supervision over litigation results in more expeditious and less costly disposition of civil cases. Thus, the Act's legislative history states, "[a]s the number of cases has increased and the cases themselves have become increasingly complex, judges, court administrators, and other civil justice system experts have recognized the importance of courts exercising early, active, and continuous control over case progress."⁵⁸

The other guiding principles for civil justice reform flow from this congressional directive to formulate a nationwide program of vigorous civil case management. The Act's legislative history stresses the importance of early judicial pretrial involvement, setting early and firm trial dates, enhancing use of magistrates, imposing greater controls on the discovery process, establishing differentiated case management systems, reforming motions practice, and expanding and enhancing the use of alternative dispute resolution techniques.⁵⁹

B. STATUTORY TASKS FOR THE ADVISORY GROUPS

The Civil Justice Reform Act requires each federal district court to implement a civil justice expense and delay reduction plan within three years of the statute's enactment.⁶⁰ In addition, the legislation designates three categories of courts to participate in accomplishing this reform: pilot districts,⁶¹ early

communities about methods for streamlining litigation practice." S. REP. NO. 416, *supra* note 3, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817 (quoting BROOKINGS INST., *supra* note 41, at 12).

56. See S. REP. NO. 416, *supra* note 3, at 15, *reprinted in* 1990 U.S.C.C.A.N. at 6817-18; see also *supra* note 27 (discussing planning group membership and process).

57. See, e.g., FED. R. CIV. P. 16 (describing judicial pretrial management techniques).

58. See S. REP. NO. 416, *supra* note 3, at 16, *reprinted in* 1990 U.S.C.C.A.N. at 6819.

59. *Id.* at 18-30, *reprinted in* 1990 U.S.C.C.A.N. at 6821-33.

60. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

61. *Id.* § 105.

implementation districts,⁶² and demonstration districts.⁶³

The statute requires the Judicial Conference of the United States to designate ten "Pilot Districts," at least five of which had to encompass metropolitan areas.⁶⁴ The courts for these districts were required to write expense and delay reduction reports and plans that conform to the Act's requirements and to implement the plans by December 31, 1991. The statute instructs the pilot districts to include the "six principles and guidelines" identified in the Act⁶⁵ in their civil justice reform plans. That statute also requires the plans to remain in effect for at least three years.⁶⁶ As of December 31, 1991, the ten pilot districts, in compliance with the Act, had completed their reports and plans.⁶⁷

Early implementation districts consist of other federal district courts that voluntarily undertook to formulate and implement a civil reform plan by December 31, 1991 under the statutory guidelines.⁶⁸ The Act provides that any district seeking early implementation status could apply to the Judicial

62. *Id.* § 103(c).

63. *Id.* § 104.

64. *Id.* § 105(b)(2).

65. *Id.* § 105 (b)(1).

66. *Id.* § 105(b)(3).

67. See ADVISORY COMM. OF THE U.S. DIST. COURT FOR THE S. DIST. OF CAL., REPORT AND PLAN (Oct. 18, 1991); ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., FINAL REPORT (Oct. 1, 1991), and U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 10; ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE N. DIST. OF GA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT, REPORT (Sept. 30, 1991), and U.S. DIST. COURT FOR THE N. DIST. OF GA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 17, 1991); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 10; ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF OKLA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, *supra* note 10; ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF PA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, REPORT (Aug. 1, 1991), and U.S. DIST. COURT FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991); CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE W. DIST. OF TENN., *supra* note 12; CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, and U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Oct. 24, 1991); ADVISORY GROUP FOR THE U.S. DIST. COURT FOR UTAH, REPORT AND PLAN (1991); U.S. DIST. COURT FOR THE E. DIST. OF WIS., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN ADOPTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 1991).

68. See Civil Justice Reform Act § 103(c), 28 U.S.C. § 471 note (Supp. II 1990).

Conference for additional resources to implement the plans.⁶⁹ Twenty-four districts had qualified as early implementation districts by December 31, 1991.⁷⁰

The statute designates five demonstration districts.⁷¹ The statute assigns courts in two of these districts the task of experimenting with "differentiated case management" systems and the courts in three of the districts the task of experimenting with alternative dispute resolution mechanisms.⁷² The statute indicates that any designated demonstration district could also seek to qualify as an early implementation district.⁷³ Four of the five demonstration districts qualified as early implementation districts by December 31, 1991.⁷⁴

The Civil Justice Reform Act requires each district court, within ninety days of the statute's enactment, to appoint an advisory group charged with carrying out the statute's mandates.⁷⁵ The Act requires that this group be balanced by the inclusion of "attorneys and other persons who are representa-

69. *Id.* § 103(c)(2). The statute also requires the Judicial Conference to prepare, within eighteen months after enactment of the law, a report on the plans "developed and implemented" in the early implementation districts. See *id.* § 103(c)(3).

70. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 6, at 2. These are United States district courts for Alaska, the Eastern District of Arkansas, the Eastern and Northern Districts of California, the Southern District of Florida, the District of Idaho, the Southern District of Illinois, the Northern and Southern Districts of Indiana, Kansas, Massachusetts, the Western District of Michigan, Montana, New Jersey, the Eastern District of New York, the Northern District of Ohio, Oregon, the Eastern District of Texas, the Virgin Islands, the Eastern District of Virginia, the Northern and Southern Districts of West Virginia, the Western District of Wisconsin, and the District of Wyoming. The ten pilot districts are also considered early implementation districts. *Id.* at 1. The Western District of Texas adopted and submitted a Report to the Administrative Office of the United States Courts after December 31, 1991.

71. Civil Justice Reform Act § 104(b), 28 U.S.C. 471 note (Supp. II 1990). These districts are the Western District of Maryland, the Northern District of Ohio, the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri. *Id.*

72. *Id.* Congress requires the Judicial Conference to study and evaluate the merits of these demonstration districts' programs and to report to it no later than December 31, 1995. *Id.* § 104(c)-(d).

73. *Id.* at § 104(a)(2).

74. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 6, at 23. These districts are the Northern District of Ohio, the Northern District of California, the Northern District of West Virginia, and the Western District of Michigan. *Id.* at app. I.

75. 28 U.S.C. § 478(a) (Supp. II 1990). The statute authorizes the chief judge of each district court to choose the members of the advisory groups, after consultation with the other judges of the court. *Id.* In the Southern District of Texas, each judge nominated a candidate for the advisory group.

tive of major categories of litigants"⁷⁶ in the court; the statute designates the district's United States Attorney as the only permanent advisory committee member.⁷⁷ The statute grants continuing existence of the advisory groups after they complete their statutory tasks of writing a report and civil justice reform plan.⁷⁸ The statute did not, however, describe in detail what continuing functions the advisory groups are to perform for the district courts.⁷⁹

The Civil Justice Reform Act confers three basic tasks on the advisory groups: assessing the condition of the district's civil and criminal dockets,⁸⁰ evaluating the reasons for the district's litigation cost and delay,⁸¹ and formulating recommendations addressing case backlog and the expense of civil litigation.⁸² The ten pilot district advisory groups proceeded under the legislative mandate not only to comply with all the statute's provisions for creation of civil justice expense and delay reduction plans, but additionally to include as part of their plans "the [six] principles and guidelines of litigation management and cost and delay reduction"⁸³ identified in the Act.⁸⁴

76. *Id.* § 478(b).

77. *Id.* § 478(d) (requiring the United States Attorney for each judicial district, or his or her designee, to be a permanent member of the advisory group). In some districts, the presence of the United Attorney on the advisory group created contention over issues relating to the state of the criminal docket and prosecutorial discretion. *See, e.g.,* Garry Sturgess, *Another Clash Over Criminal Caseload*, *LEGAL TIMES*, April 1, 1991, at 7 (discussing tensions within the Advisory Group for the District of Columbia with regard to prosecution of criminal drug offenses). The District of Columbia was not one of the ten pilot district courts, but had begun its work as an advisory group. *Id.*

78. *See* 28 U.S.C. § 478(d) (Supp. II 1990) (providing that no member of an advisory group shall serve for longer than four years).

79. Section 475 is the only section of the Act that addresses this issue. It provides that advisory groups should be consulted when the district conducts mandatory periodic assessments of their civil and criminal dockets. *Id.* § 475.

80. *Id.* § 472(c)(1).

81. *Id.* § 472(c)(1)(C)-(D).

82. *Id.* § 473. This section of the Act recommends in detail, procedural innovations for the Advisory Groups to consider in developing their civil justice reform plans. *Id.*

83. Civil Justice Reform Act § 105(b)(1), 28 U.S.C. 471 note (Supp. II 1990).

84. *See* 28 U.S.C. § 473 (Supp. II 1990) (detailing recommended and required content of civil justice expense and delay reduction plans). This section, the heart of the Act, delineates a long list of recommended and required procedural innovations. Subsections (a) and (b) indicate that the advisory groups "shall consider and may include" a variety of procedural techniques to manage litigation and reduce cost and delay. The techniques include differential case management; undertaking early and ongoing pretrial judicial case management; setting early, firm trial dates; controlling and closely monitoring

The statute assigns two distinct tasks to the advisory groups: writing reports that set forth the conditions in the district,⁸⁵ and formulating civil justice reform plans to address those conditions.⁸⁶ To date, most pilot and early implementation districts have issued separate reports and plans.⁸⁷ The plans typically distill new local rules, measures, or programs that districts are implementing to reduce cost and delay.⁸⁸

C. WHILE AMERICA SLEPT: OF PROBLEMATIC SOCIAL SCIENCE AND RULEMAKING

Procedure has always been a whipping boy upon which those anxious to secure prompt, sometimes summary, adjudication of rights vent their spleen over so-called delays.

Justice Stanley Reed⁸⁹

Writing in laudatory terms regarding the speed with which Congress enacted the Civil Justice Reform Act, the Senate Judiciary Committee's staff director noted:

The process by which this legislation became the law of the land is equally significant. . . . Less than twelve months passed between the introduction of the Act and its enactment—a rather remarkable feat, even the critics of the Act must concede, in an area of the law in which reform has been both incremental in scope and languid in pace. Action that typically occupies several years and multiple Congresses took only one year and only one session of a single Congress.⁹⁰

the scope and extent of discovery; setting timetables for disposition of motions; managing complex cases; providing for voluntary disclosure; and referring parties to alternative dispute resolution mechanisms.

85. *Id.* § 472(b) (requiring advisory groups to submit reports to their district courts and that these reports be available to the public). The legislation indicates that the advisory committee reports must include an assessment of the docket, the basis for the advisory committee's recommendations, recommended measures, rules, and programs, and an explanation of the way in which the recommended measures, rules and programs comply with § 473, which dictates the contents of civil justice reform plans. *Id.*

86. *Id.* §§ 471, 472(a).

87. *See, e.g., supra* notes 10-12, 67, 70 (reports and plans). Some districts have issued combined reports and plans.

88. *See, e.g., supra* notes 10-12, 67.

89. *The Rule-Making Function and The Judicial Conference of the United States*, *supra* note 8, at 133.

90. Peck, *supra* note 27, at 106. Mr. Peck attributed the expedited passage of the law to three factors: "(1) careful and deliberate study [that] preceded legislative action; (2) consensus . . . with common opponents forging an unprecedented alliance;" and "(3) under Senator Biden's stewardship reasonable compromise outlasted stubborn resistance." *Id.*

The "careful and deliberate study" refers to the Louis Harris survey that supplied the empirical basis for the Brookings-Biden report. This report was completed in a very short time-frame, and is subject to methodological chal-

At least one witness before the Senate Judiciary Committee noted that the Civil Justice Reform Act was the "sleeper" legislation of the year.⁹¹ This is an apt metaphor: while America slept, Congress pressed into law an Act that fundamentally affects procedural and substantive justice in the federal courts. The Act was stealth legislation, swiftly following the Brookings-Biden task force report, a report based on a questionable empirical study⁹² commissioned by reform proponents whose task force included no sitting federal judges.⁹³

The Senate and House held three legislative hearings with witnesses who were largely predisposed to accept the Brookings-Biden report and its recommendations.⁹⁴ Indeed, task

lenge. As was true throughout this legislative reform effort, the Harris survey questions assumed the problem it was seeking to define. See LOUIS HARRIS AND ASSOCIATES, INC., *PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM, A STUDY CONDUCTED FOR: THE FOUNDATION FOR CHANGE, INC.* (March 1989), reprinted in *The Civil Justice Reform Act of 1990 and The Judicial Improvements Act of 1990: Hearings Before The Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 91-184 (1990) [hereinafter *Senate Hearings*].

The "unprecedented alliance" that was forged in support of the legislation was actually an alliance that was forged in support of the Brookings-Biden task force and report; the same people who worked for the task force reappeared to support the legislation. Notwithstanding the self-description of diversity by that task force and the Senate Judiciary Committee, the Brookings-Biden Task force was heavily weighted with corporate and insurance interests. See *supra* note 42 (discussing task force membership).

As to the "reasonable compromise" that outlasted the "stubborn resistance," the questions the Judicial Conference of the United States Courts raised in its testimony can hardly be characterized as "stubborn resistance." See discussion *infra* Part II.B. If anything, the questions the Conference presented regarding basic constitutional authority were rather weakly asserted and not vigorously pursued by the Conference's representatives to the legislative hearings. The Judicial Conference's objections simply were disregarded, belying the notion that Senator Biden and his staff forged a compromise that saved the day. See discussion *infra* Part II.

91. *Senate Hearings*, *supra* note 90, at 55 (testimony of Mr. Patrick Head)

92. See *supra* note 90 (discussing the Harris survey).

93. See *Senate Hearings*, *supra* note 90, at 329 ("[N]o active judicial officer was asked to serve on the task force") (statement by Judge Robert F. Peckham, Chief Judge, U.S. Dist. Court for the N. Dist. of Cal., on behalf of the Judicial Conference, regarding Title I of S. 2648 Civil Justice Expense and Delay Reduction Plans).

94. See *Senate Hearings*, *supra* note 90 at 2, 307 (hearings held on March 6 and June 26, 1990); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *House Hearing*].

Of the ten witnesses who appeared before the two Senate hearings, only six witnesses supported the bill, and five of the six were members of the Brookings-Biden task force. See *infra* note 95. Only one federal judge, Judge Richard A. Enslen, testified in support of the bill. See *Senate Hearings*, *supra*

force members appeared at the hearings to endorse their own previous efforts and proposals.⁹⁵ The Senate and House committees called few witnesses from the broader community of those interested in federal practice and procedure. The Act's legislative record is devoid of any contributions from other organizations interested in problems of judicial administration,⁹⁶ or from the scholarly community that regularly teaches and

note 90, at 227-84 (testimony and prepared statement of Judge Richard A. Enslin).

Three disfavoring witnesses were federal judges, none of whom had been members of the Brookings-Biden task force. *See id.* at 360-76 (testimony, prepared statement, letter, and response to written questions of Judge Diana E. Murphy, president of the Federal Judges Association); *id.* at 319-48, 397-404 (testimony, prepared statement, and response to written questions of Judge Robert F. Peckham, representing the Judicial Conference of the United States); *id.* at 208-25, 288-305 (testimony, prepared statement, and response to written questions of Judge Aubrey E. Robinson Jr., representing the Judicial Conference of the United States). A fourth witness, Judge Walter T. McGovern, testified only in support of the additional judgeships proposed in Title II of S. 2648 as essential in achieving any improvements in the handling of the civil docket. *See id.* at 349-60, 405 (testimony and prepared statement of Judge Walter T. McGovern, representing the Judicial Conference of the United States).

95. *See, e.g., Senate Hearings, supra* note 90, at 8-28, 45-46, 82-84, 202-07 (testimony, prepared statement, and response to written questions of Mr. Patrick Head, vice president and general counsel of the FMC Corporation, and former general counsel of Montgomery Ward); *id.* at 29-32, 196-97 (testimony and response to written questions of Mr. Gene Kimmelman, legislative director of the Consumer Federation of America); *id.* at 377-90 (testimony and written statement of Mr. Carl Liggio, general counsel of Ernst & Young and former chairman of the Board of the American Corporate Counsel Association); *id.* at 41-44, 50-53, 189-95 (testimony, prepared statement, and response to written questions of Mr. Stephen Middlebrook, senior vice president and general counsel of Aetna Life & Casualty and member of the Executive Committee of the American Corporate Counsel Association); *id.* at 36-41 (testimony of Mr. Bill Wagner, personal injury and wrongful death trial attorney and president of the Association of Trial Lawyers of America). Several of these witnesses also appeared in the *House Hearing, supra* note 94.

96. Other possible groups that might have been consulted during the drafting stages include: the Advisory Commission on Intergovernmental Relations, the American Bankruptcy Institute, the Lawyers Conference of the American Bar Association, the Section of Individual Rights and Responsibilities of the American Bar Association, the Section of Litigation of the American Bar Association, the Section of Tort and Insurance Practice of the American Bar Association, the American College of Trial Lawyers, the American Judicature Society, the Conference of State Court Administrators, the Council of Chief Judges of Intermediate Appellate Courts, the National Association for Court Management, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Bankruptcy Conference, the National Bar Association, the National Conference of Commissioners on Uniform State

writes about federal practice and procedure.⁹⁷

In addition, the Act was drafted without consultation from a variety of constituencies that might have been interested in the legislation, including organizations devoted to the study of judicial administration, public interest groups,⁹⁸ state attorney generals' organizations, public defender services, the criminal bar, and the Department of Justice.⁹⁹ The Senate also proceeded without initial consultation with the judicial branch and completely ignored the judicial rulemaking bodies until the Judicial Conference raised a significant protest.¹⁰⁰

The lack of congressional responsiveness to the concerns of the judiciary is striking.¹⁰¹ Judicial Conference representatives found it necessary to appear three times to question the haste with which the Senate drafted the legislation, to question the Senate Judiciary subcommittee's exclusion of federal judges from a process that intimately affected their courts' internal affairs, and to question Congress's presumed general authority to enact a bill so intricately involved with procedural rulemaking.¹⁰² Six federal judges wrote to oppose the legislation,¹⁰³

Laws, the National Conference of State Legislators, the National District Attorneys Association, and the National Legal Aid and Defender Association.

By defining the crisis of civil justice as one concerned with making the American business community more competitive, the Senate Judiciary committee formulated a narrow concept of the civil justice problem which excluded the insights of the diverse communities generally concerned with judicial administration. The Senate's narrow perspective failed to comprehend civil justice reform as part of a larger picture of justice reform that includes problems of criminal justice administration and the relationship between state and federal courts.

97. Cf. *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. III-IV (1987, 1988) [hereinafter *Court Reform and Access to Justice Act Hearings*] (witnesses and additional materials submitted in relation to proposed legislation).

98. But see *Senate Hearings*, *supra* note 90, at 474-77 (letter from Alan B. Morrison, Public Citizen Litigation Group).

99. See *id.* at 81 (statement of Sen. Charles E. Grassley, commenting on severity of criminal docket and the lack of Justice Department consultation and participation in drafting and testifying on the legislation).

100. See *id.* at 208-210.

101. But see S. REP. NO. 416, *supra* note 3, at 4, reprinted in 1990 U.S.C.C.A.N. at 6806 (asserting that "[t]he Judicial Conference . . . was involved extensively with the committee as it considered the Civil Justice legislation [M]any of the Conference's specific suggestions have been incorporated into S.2648 as amended.").

102. See, e.g., *Senate Hearings*, *supra* note 90, at 91-184, 319-76, 208-25; *House Hearing*, *supra* note 94, at 103-44 (testimony and prepared statement of Judge Robert F. Peckham, on behalf of the Judicial Conference).

103. See *House Hearing*, *supra* note 94, at 372-83 (letter from Judge J.

while only two wrote in support.¹⁰⁴

The sniping between the legislative and judicial branches forms a troubling undercurrent to the Act that makes interesting reading in the legislative history.¹⁰⁵ This dispute is symptomatic of the tension relating to the allocation of procedural rulemaking authority between these branches.¹⁰⁶ Apart from the inherent interest in the spectacle of a senator venting irritation at a Judicial Conference representative,¹⁰⁷ the exchanges between congressional committee members and Judicial Conference representatives suggest the lack of seriousness Congress accorded the statutory and constitutional questions involved in promulgating the Act.¹⁰⁸

The haste with which Congress acted in passing the legislation, as well as the haste the Act itself demands for accomplishing its mandated reforms, are destined to bedevil Congress's stated goal of improving federal civil justice administration. The immediate result of this haste is a bad piece of legislation, based on questionable social science, lobbied through Congress at the behest of a small group of reformists with a particular civil justice agenda. This legislative haste has set in motion ninety-four amateur advisory groups that, without any previous rulemaking experience, are performing tasks they are ill-equipped to handle. In the ten pilot districts, the expedited schedule for filing the required reports and plans has in some instances encouraged hurried empirical studies accompanied by dubious analysis and conclusions.¹⁰⁹ In the long-term, the rush to reform will contribute to poorly-drafted, problematic rules

Fredrick Motz, Dist. of Md.); *id.* at 384-91 (letter and memorandum from Judge William L. Hungate, E. Dist. of Mo.); *id.* at 393-97 (memorandum from Judge William M. Hoeveler, Chair, National Conference of Federal Trial Judges); *id.* at 417-25 (comments of Chief Judge William J. Bauer on behalf of the United States Court of Appeals for the Seventh Circuit); *id.* at 431-33 (letter from Judge G. Thomas Eisele on behalf of the Eighth Circuit Judicial Conference); *id.* at 434-437 (letter from Chief Judge Barefoot Sanders, N. Dist. of Tex.).

104. See *Senate Hearings*, *supra* note 90, at 478 (letter of Chief Judge John F. Gerry, Dist. of N.J., reporting the unanimous support of the New Jersey District Court Judges for the revised version of the bill); *id.* at 479 (letter from Judge Dickinson R. Debevoise, Newark, New Jersey).

105. See *id.* at 309-11 (statement of Sen. Biden regarding negotiations on the legislation).

106. *Id.* at 309-11; see also S. REP. NO. 416, *supra* note 3, at 4-5, 9, reprinted in 1990 U.S.C.C.A.N. at 6807, 6811.

107. See *Senate Hearings*, *supra* note 90, at 309 (statement of Sen. Biden).

108. See *infra* text accompanying notes 138-48.

109. See CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1.

that will be easily challenged, thereby defeating Congress's overarching goal of reducing cost and delay in the federal courts.

With pluralistic zeal, Congress sought to confer rulemaking power on local citizens' groups and the system's so-called "users."¹¹⁰ In hindsight, it now seems absurd that Congress created ninety-four miniature social-science think-tanks throughout the federal judiciary and entrusted these groups with tasks that lay groups cannot perform with any intellectual rigor. For example, Congress ordered the advisory groups to "promptly complete a thorough assessment of the state of the court's civil and criminal docket."¹¹¹ In so doing, Congress required the advisory groups to

determine the condition of the civil and criminal dockets . . . to identify trends in case filings and in the demands on the court's resources . . . [to] identify the principal causes of cost and delay in civil litigation . . . [and to] examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.¹¹²

It is even more startling that Congress failed to discuss adequately the impact of crowded criminal dockets on the flow of civil litigation in relation to reforming the civil justice system.¹¹³ In many districts, the major reason for the backlog of the civil docket is the Speedy Trial Act requirement that criminal cases be heard expeditiously.¹¹⁴ Thus, Congress chose not to recognize that increased numbers of criminal prosecutions are a major cause of cost and delay in civil litigation, something that is not necessarily an intrinsic part of the civil litigation process.¹¹⁵

For this reason the solution to the civil justice "crisis" may

110. Cf. Peck, *supra* note 27, at 117 (citing derisively to the "near-mystical reverence of the rulemaking authority exercised by the Judicial Conference").

111. 28 U.S.C. § 472(c)(1) (Supp. II 1990).

112. *Id.* §§ 472(c)(1)(A)-(D).

113. The absence of any mention of criminal cases is striking. See generally S. REP. NO. 416, *supra* note 3 at 1-72, reprinted in 1990 U.S.C.C.A.N. 6802-60.

114. 18 U.S.C. § 3162(a)(2) (1988), which provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." See also CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 22-25 (discussing the criminal docket's impact on the civil docket).

115. See *Senate Hearings, supra* note 90, at 83 (containing written response of Mr. Patrick Head reflecting lack of research and consideration of impact of increased criminal cases); *id.* at 211 (containing statement of Judge Aubrey E. Robinson, Jr. relating to criminal docket as contributing factor to civil delay).

lie in reducing criminality and the consequent crushing load of criminal prosecutions in American courts, rather than the wholesale reform of civil procedure. The Civil Justice Reform Act speaks to the burdens of civil litigation on corporations and middle class Americans, but the legislation says nothing about the burdens of criminal offenses on the courts and society. The Act requires civilian advisory groups to seek out the root causes of cost and delay in civil cases, but it says nothing about a congressional duty to seek out the root causes of criminality and the backlog of criminal prosecutions.

Although Congress required the advisory groups to conduct docket assessments, the statute and its legislative history provided the advisory groups with neither normative goals nor guidance for performing the assessments. The Act offered the district advisory groups no instructions to ensure uniform docket assessments across all ninety-four district courts.¹¹⁶ Instead, the Act simply instructed groups to accomplish this task. The Act did not indicate what time frame the groups should use to assess the docket condition nor what baseline period to provide a comparative measure, nor did the legislation supply any other parameters to facilitate a statistical docket analysis. Definitional problems therefore, will plague advisory groups because the Act and its legislative history simply do not offer adequate guidance for the tasks the law requires of them.¹¹⁷

The pilot advisory groups also received little direction. After the groups were created, the Federal Judicial Center and the Administrative Office of the United States Courts supplied the groups with some materials and advice relating to court statistics,¹¹⁸ but the groups were not given any technical guidance or support for data collection and interpretation. Instead, much of the technical advice consisted of negative descriptions of im-

116. At a seminar-workshop for the pilot courts under the Civil Justice Reform Act of 1990, held August 1-2, 1991, it became apparent that the pilot districts were adopting different methodologies to conduct their docket assessments, and that there was no agreement among the advisory group members and their advisors concerning the proper or most appropriate methodology for accomplishing this statutory task. (Author present at this meeting).

117. In conducting a docket assessment, for example, the advisory groups have no standards to determine whether the docket condition is "good," "bad," or otherwise.

118. See Memorandum to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990 (May 29, 1990) (including questionnaires and forms developed by the Southern District of Florida and the Research Division of the Federal Judicial Center) (on file with the *Minnesota Law Review* and the author).

proper docket assessment methods.¹¹⁹ Furthermore, some advisory groups, because of the short statutory deadlines for preparing the reports and plans, had to rely on the statistics the Administrative Office of the United States Courts and the Federal Judicial Center supplied.¹²⁰ These circumstances severely constrained, if not compromised, each group's ability to conduct an independent docket assessment.

As a result, the pilot districts' advisory groups used different methods to assess their dockets. Some performed their own docket assessments,¹²¹ in others court clerks performed this task,¹²² and in some the advisory groups hired independent consultants to evaluate the dockets.¹²³ These varying, locally-inspired approaches guaranteed that docket assessments would be conducted in non-uniform fashion, using different data bases, assumptions, and social science methodologies.¹²⁴ If there were any intention on Congress's part to develop a national profile of

119. See Examples and Materials Prepared for the Seminar-Workshop for the Pilot Courts Under the Civil Justice Reform Act of 1990 (Kansas City, Kan., Aug. 1-2, 1991) (Federal Judicial Center) (on file with author and with the *Minnesota Law Review*).

120. Compare CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 26 (identifying such statistics in measuring civil docket) and ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF IND., REPORT AND PLAN (Dec. 20, 1991) (relying on provided court management statistics and interviews) with ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE S. DIST. OF N.Y., *supra* note 10, (conducting extensive survey of practicing attorneys and judges).

121. See ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10, (hoping to obtain funding to engage a consultant); ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 67 ("The district conducted a survey").

122. See CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at APPENDIX C: REPORT OF THE CLERK ON THE STATUS OF THE DOCKET FOR THE U.S. DIST. COURT, S. DIST. OF TEX., (APR. 29, 1991). The clerk's report formed a preliminary assessment of the docket. A consulting statistician assisted in preparing the final docket assessment which used longer statistical trends. *Id.* at 26-31.

123. See ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 67; SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 67; CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1.

124. Compare ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 67, (attorney survey and judicial officer interview) and ADVISORY GROUP FOR THE U.S. DIST. COURT OF THE DIST. OF WYO., REPORT AND RECOMMENDED PLAN (survey and invited testimony) with ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF IND., *supra* note 120 (court management statistics and interviews).

the state of the federal docket, the statute's undefined directives to the advisory groups will fail to achieve this goal.¹²⁵

Similar criticisms may be directed at the other tasks Congress assigned to the local advisory groups. The mandate to "identify trends in case filings and in the demands being placed on the court's resources,"¹²⁶ for example, is likewise open-ended and ill-defined, and thus leaves the advisory groups in a methodological lurch. At the most obvious level, the failure to designate an appropriate baseline leaves advisory groups with the free-form task of spotting and determining "trends." Congress provided no hints as to whether the advisory groups are to assess trends solely in the districts, or in comparison with other districts, or nationwide. Similarly, Congress did not define "demands on the court's resources," raising questions about the type and severity of the "demands" and the nature of the "resources."

One can only conclude that the Act's docket-assessment requirement is mere window-dressing. Congress, in requiring the advisory groups to "identify the principal causes of cost and delay in civil litigation,"¹²⁷ assumed the very problem it is attempting to identify. Congress did not ask the advisory groups to determine, through their docket assessment, whether there *actually are* problems with cost and delay in the civil justice system.¹²⁸ Rather, the Civil Justice Reform Act simply stated

125. The Report for the Southern District of Texas recommends that the judicial system consider improved methods of data collection that will assist advisory groups in their future function of monitoring the district docket. ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 77. Congress apparently had no such intention to generate a useful and uniform set of data from the reports written pursuant to the Act.

126. 28 U.S.C. § 472(c)(1)(B) (Supp. II 1990).

127. *Id.* § 472(c)(1)(C).

128. See *Senate Hearings*, *supra* note 90, at 37 (statement of Mr. Bill Wagner, using testimony by anecdote); *id.* at 83 (written response of Mr. Patrick Head indicating absence of any examination of impact of increased criminal cases and noting the strain of social security appeals); *id.* at 227 (statement of Judge Enslen that Brookings-Biden task force did not spend much time identifying the problem because it already knew what it was); see also *House Hearings*, *supra* note 94, at 214 (testimony of Mr. Stuart Gerson relating to litigation explosion "canards" and that these "myths" ought to be explored); *id.* at 394 (memorandum from William M. Hoevler, Chair, National Conference of Federal Trial Judges noting "undocumented premises"); *id.* at 407 (joint statement of various New York bar associations in opposition to the Civil Justice Reform Act, noting "little or no empirical data on the benefits of the new procedures"); *id.* at 431 (letter from Judge G. Thomas Eisele, noting no statistical evidence of failure to process civil caseloads expeditiously and efficiently).

that there is a problem with cost and delay and the Act's requirements for reform flow from this assumption.

The task of "identify[ing] the principal causes of cost and delay in civil litigation" is similarly futile and is virtually impossible for a lay advisory group to accomplish.¹²⁹ Social scientists have studied these problems for years and have produced competing analyses and conclusions.¹³⁰ Opponents of the Act repeatedly cited competing studies that refuted Congress's findings relating to crisis in the federal courts.¹³¹ The citation of competing studies, however, had little effect in slowing the congressional reform juggernaut. Existing studies, if anything, teach that conducting empirical research relating to litigation cost and delay is exceedingly difficult, complex, and time-consuming.¹³²

The Federal Judicial Center realized the difficulty of this particular statutory task and attempted to assist advisory groups in the pilot and early implementation districts in conducting a survey of civil litigation in the districts.¹³³ The Judicial Center intended this survey to supply some empirical basis to allow the advisory groups to assess the principal causes of cost and delay. The Judicial Center provided the groups with a

129. Unless, of course, Congress was not serious about this endeavor, either. Arguably, asking the advisory groups to identify the principal causes of cost and delay was some more window-dressing to support the pre-ordained procedural reforms that Congress demanded the local district courts implement.

130. Compare *Senate Hearings*, *supra* note 90, at 91-184 (Louis Harris Survey analyzing and documenting major problems of cost and delay in civil litigation; basis for BROOKINGS INST., *supra* note 41), with TERENCE DUNGWORTH & NICHOLAS M. PACE, RAND, THE INSTITUTE FOR CIVIL JUSTICE 1990, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (pointing to the paucity of empirical data and concluding that the rate of disposition of civil cases in 1986 was similar to that in 1971).

131. See *Senate Hearings*, *supra* note 90, at 35 (letter from Consumer Federation of America stating it did not find data indicating any "relationship between competitiveness and the federal judicial process"); *id.* at 190 (response of Mr. Middlebrook indicating lack of data on impact of civil litigation on American business competitiveness in the global market); see also *House Hearing*, *supra* note 94, at 84-85, 101 (testimony of Mr. Bryant relating to lack of data and contrary Rand study); *id.* at 115-16 (written statement by Judge Robert F. Peckham referring to contrary Rand study); *id.* at 163 (statement of Judge Diana Murphy, noting Rand study); *id.* at 179 (exchange between Rep. Kastenmeier and Judge Diana E. Murphy on competing statistical analysis in Rand study); *id.* at 431 (letter from Judge G. Thomas Eisele, citing Rand study).

132. See, e.g., Hensler, *supra* note 28; Geyelin, *supra* note 33.

133. See Memorandum to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, *supra* note 118.

proposed questionnaire and advice on composing a statistically valid survey sample, thereby transforming pilot advisory groups into amateur survey-researchers.

Various methodological problems with both the questionnaire and the sampling technique are readily apparent.¹³⁴ The deficiencies in this attempted empirical research undermined the ability of some advisory groups to draw reasonably supportable conclusions concerning the principal reasons for cost and delay in the district.¹³⁵ At best, these efforts at amateur social science may have enabled advisory groups to assemble some raw data and anecdotal commentary concerning the conduct of civil litigation. But unless and until advisory groups conduct responsible empirical studies, hard data relating to the "principal causes of cost and delay" will remain elusive.

Undoubtedly it is both premature and unfair to anticipate wholesale ill-effects of the Civil Justice Reform Act, especially when conscientious lawyers, judges, and citizens currently are volunteering hundreds of hours to serve on advisory groups across the country. It may take years under the new local reform plans to assess whether Congress was wise in requiring speedy civil justice reform. More immediately, however, there is something troubling about the haste with which Congress passed this broad-sweeping reform package and the lack of meaningful congressional consultation with significant constituencies. For legislation so self-consciously concerned with "users" of the system, Congress, in its own deliberative processes, did not consult a sufficiently broad cross-section of people interested in the problems of judicial administration.

Further, something "insiderish" permeates the Civil Justice Reform Act which contrasts with the democratic rhetoric extolled in the legislative hearings¹³⁶ and congressional reports.¹³⁷ Despite the rhetoric in the Act's legislative history about the inclusiveness of the Brookings-Biden task force, business, corporate, and insurance industry litigators were heavily represented in comparison to other constituencies with inter-

134. See, e.g., CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 44 n.62.

135. *Id.* at 46 (advisory group did not have adequate statistical base to draw conclusions relating to costs of litigation and was unable to draw conclusions from data to "principal causes of costs").

136. See, e.g., *Senate Hearings*, *supra* note 90, at 1-3 (statement of Sen. Biden); *id.* 29-30 (exchange between Mr. Kimmelman and Sen. Hatch).

137. See S. REP. NO. 416, *supra* note 3, at 3-4, 6-9; *reprinted in* 1990 U.S.C.C.A.N. at 6805-06, 6808-12.

ests in the federal courts.¹³⁸ The subsequent congressional hearings on the Act were stacked with Brookings-Biden task force members who had a vested interest in their own work product and the reform movement. There is nothing democratic about vesting power in an unelected group of elite lawyers who are not responsible to any constituency or elected official. Significantly, the Brookings-Biden task force had proceeded under predetermined conclusions about crisis in the federal courts, as did the Senate Judiciary subcommittee staff that drafted the Act.

For years to come, the Act will create a massive, semi-permanent, amateur reform bureaucracy as an adjunct to the federal courts. These advisory groups will now sit, uneasily, along with the federal judicial-branch rulemaking bodies. Further, as the analysis above suggests, the legislation is poorly drafted and ill-defined, and sets implausible (if not impossible) tasks for lay advisory groups. Viewed cynically, the Civil Justice Reform Act amounts to a superficial layer of local pluralism that disguises what is essentially congressionally-dictated civil justice reform.

II. TURF BATTLES: CONGRESSIONAL CONSIDERATION OF THE CIVIL JUSTICE REFORM ACT'S CONSTITUTIONAL AND STATUTORY UNDERPINNINGS

Writing in 1991 about the negotiations between the Senate Judiciary Committee and the Judicial Conference concerning the Civil Justice Reform Act, the Judiciary Committee's staff director suggested that "[r]egrettably, . . . this battle over turf should not and need not have occurred."¹³⁹ The staff director saw the "turf battle" as a tempest in a teapot because the judicial branch held a mistaken view of its rulemaking prerogatives and Congress had the right to perform rulemaking duties when it felt the judiciary was moving too slowly.¹⁴⁰

138. See *supra* notes 42, 90, 95 (discussing participants in the Brookings-Biden task force).

139. Peck, *supra* note 27, at 114; see also note 31 (quotation from Peck, *supra* note 27).

140. *Id.* at 114. The staff director's conclusion was based upon his belief that the judicial branch was mistaken in its understanding that it had rulemaking power. In addition, Mr. Peck perceived the legislative process as allowing the "judiciary a substantial role in shaping the final bill." *Id.* Mr. Peck's rendition of events is, perhaps, skewed in that the Judicial Conference

The staff director's self-justifying—but inaccurate—description of the congressional debate over the bill reflects the lurking turf battle embodied in the separation of powers issue. This insufficiently developed issue proved to be a fundamentally troubling dimension of the Act. The staff director stated that:

[m]uch of the debate over the . . . [Civil Justice Reform Act] centered not on the merits of the underlying proposals, but on the appropriate source of the proposals themselves. Many within the judiciary framed the debate in this fashion: should the reform proposals encompassed within the . . . [Act] originate in Congress, or should they—indeed, must they—originate within the judiciary by virtue of the Rules Enabling Act or, more broadly, because of the doctrine of separation of powers.¹⁴¹

The Senate Judiciary Committee's staff director's statement disingenuously suggests that much of the debate centered on the source of congressional authority for the Act. This reflects a distortion of the legislative hearings and the staff negotiations that resulted in the legislation. Actually, little "debate" took place over the underlying constitutional questions relating to the respective allocation of rulemaking authority, the separation of powers doctrine, or the general constitutional authority of Congress to enact the Act. There was also little meaningful discussion of the Rules Enabling Act and that statute's requirements and limits. In fact, most of the laudatory testimony in support of the bill centered on the specific merits of the legislative proposals; the parade of reform advocates did not discuss the rulemaking problems unless prompted to do so.¹⁴² If anything, the opposite of the staff director's assertion is true.

Enamored of the reform movement, the bill's proponents never paused to question congressional authority to legislate

representatives stated, in successive hearings, that active federal judges had not been part of the Brookings-Biden task force which had laid the groundwork for the Civil Justice Reform Act, nor had any judicial representative been consulted by the Senate subcommittee drafting of the bill. The testimony from Judicial Conference representatives suggests, if anything, that the introduction of the Civil Justice Reform Act took the judicial branch by surprise and that the Judicial Conference scurried to form its judicial subcommittee to analyze and respond to provisions in the legislation. *See Senate Hearings*, *supra* note 90, at 217-18 (prepared statement of Judge Aubrey F. Robinson Jr.); *id.* at 329-31 (statement of Judge Robert F. Peckham); *House Hearing*, *supra* note 94, at 121-25 (same). Mr. Peck's remarks are also noteworthy for the suggestion that, as a matter of policy, Congress is justified in usurping rulemaking power when the judicial branch moves too slowly in effecting rule reform.

141. Peck, *supra* note 27, at 114.

142. *See, e.g., supra* note 95 (testimony of favorable witnesses).

speedily to achieve its identified goals of civil justice reform. Even the Judicial Conference representatives, the bill's most vocal opponents, who had expressed grave reservations about the constitutionality of congressional authority to pass the legislation, devoted the bulk of their testimony to specific provisions pertaining to particular procedural reforms.¹⁴³

Ultimately, the Civil Justice Reform Act is crucially important because of the way it reallocates the rulemaking function from the judiciary to Congress, a reallocation that is likely to have continuing consequences. The paucity of considered debate surrounding this congressional usurpation of authority is significant in itself. Perhaps symptomatic of legislative hearings in general, the hearings on the Civil Justice Reform Act did not provide a forum for close examination of the fundamental constitutional questions relating to the bill, the Rules Enabling Act, or the separation of powers problems inherent in the legislation.

As will be seen, various bill proponents did not raise the statutory and constitutional issues and, when questioned about rulemaking authority, offered superficial, muddled answers. The Judicial Conference representatives hesitantly but repeatedly suggested the statutory and constitutional issues relating to the bill, but they did not press their points. Similarly, a Justice Department representative also flagged potential constitutional problems while maintaining the executive branch's commitment to the doctrine of separation of powers, but he lamely raised and inadequately pursued the constitutional question. American Bar Association witnesses noted a split in their ranks on the constitutional questions and expressed some doubts about Congress's rulemaking authority, but ultimately this organization's representatives did not press the issues either. Therefore, in view of these tepid challenges, the Senate subcommittee simply asserted congressional rulemaking authority based not on reasoned legal theory but on legislative fiat.

A. THE LEGISLATION'S PROPONENTS

The Senate and House held three days of hearings on revised versions of the Civil Justice Reform Act.¹⁴⁴ These hearings reflected sparse discussion of the fundamental statutory

143. See *Senate Hearings*, *supra* note 90, at 208-25, 314-60 (testimony of Judicial Conference representatives).

144. See *id.* at 2, 307; *House Hearing*, *supra* note 94, at 1.

and constitutional questions surrounding the Act, especially from the sponsors and proponents of the bill. Two examples illustrate the low level of discussion and concern. On the first day of hearings, Senator Orrin Hatch broached the separation of powers issues only in the most generalized terms:

The rationale of the doctrine of separation of powers counsels the legislative branch to be extremely cautious when it considers intrusions into the other two branches. And I dare say that Federal judges who review the meaning of many of the laws we enact probably have several detailed and choice ideas on how we can better conduct our business. I am equally confident that the Congress would not look too kindly on having the judiciary's ideas imposed on us. As a matter of fact, we have not looked very kindly on some of their ideas from time to time, both conservatives and liberals, believe it or not.¹⁴⁵

Obviously, this rhetorical statement does little to elucidate the statutory and constitutional problems implicated in the Civil Justice Reform Act. An even more telling colloquy occurred between Senator Biden, chair of the Senate Judiciary Committee and the bill's sponsor, and Mr. Patrick Head, Vice President and General Counsel of the FMC Corporation.¹⁴⁶ Mr. Head was a member of Senator Biden's Brookings task force who testified in support of the Act.¹⁴⁷ At the conclusion of Mr. Head's testimony, Senator Biden posed the separation of powers question concerning the rulemaking authority of the respective branches. Mr. Head's muddled response anticipated the general, superficial, confused consideration Congress afforded the entire issue of the proposed statute's constitutional underpinnings.

THE CHAIRMAN: Mr. Head, would you be willing to speak for a moment to this separation of powers issue? Do you see any conflict?

MR. HEAD: I don't really. This is essentially a procedural system. This is not a substantive system. I was impressed, again, when Chief Judges [Robert F.] Peckham and [Carl B.] Reaben [sic] attended because the chief judge of a district does not have any power today. The chief judge can't move a case. We can't go to the chief judge and say this judge is sitting on this motion now for 10 months, do something about it. They can't do that.

This system would allow a lot more activity in the district than can happen today, and it is of a procedural nature. None of these get into the substance of a case, but there [sic] impingement on the actual

145. *Senate Hearings*, *supra* note 90, at 5. Senator Hatch returned to the hearings at various junctures to express his deep skepticism about the legislation. See, e.g., *House Hearing*, *supra* note 94, at 585-86 (containing additional views of Mr. Hatch).

146. See *Senate Hearings*, *supra* note 90, at 8-9, 54-58 (testimony of Mr. Patrick Head).

147. *Id.* at 10.

result in a case by some of these procedures. And I believe in the long run the Federal judges will welcome this when they take a close look at it, as did Judges Peckham and Reuben in that 4-hour session.

THE CHAIRMAN: Would anyone else like to comment on that issue?

[NO RESPONSE].¹⁴⁸

With all due respect, Mr. Head's response did not address the import of Senator Biden's question. Therefore, ironically, Mr. Head's answer nicely made the case for the judiciary's rulemaking authority over the procedural reforms that Congress usurped for itself in the Act. Apparently there was no fooling Mr. Head: he knew a package of procedural reforms when he saw them. If it is true, as he twice asserted, that the Act proposed a procedural system rather than a substantive system, then that division describes the rulemaking allocation of the Rules Enabling Act: procedural rulemaking belongs to the judicial branch, substantive lawmaking to the legislative. In quite innocently getting it wrong for the legislative subcommittee, Senator Biden's witness actually got it right for the judiciary.

Senator Hatch's statement and the exchange between Senator Biden and Mr. Head constitute the entire discussion by the bill's proponents of the separation of powers issue. Senator Biden did include, as part of the written legislative record, a conclusory staff memorandum asserting that Congress possessed exclusive power to enact the Civil Justice Reform Act.¹⁴⁹ During the hearing's remaining three days, Judicial Conference representatives, witnesses from various judicial organizations, the American Bar Association, and the Justice Department raised statutory and constitutional arguments pertaining to the Rules Enabling Act and separation of powers issues, but the Senate paid little heed.

B. THE JUDICIAL CONFERENCE

Representatives of the Judicial Conference of the United States Courts¹⁵⁰ appeared three times to oppose enactment of

148. *Id.* at 58.

149. Senator Biden requested that a memorandum prepared by his staff, summarizing the constitutional questions, be entered in the record "for the benefit or the criticism of my colleagues who will read the record." *Id.* at 59. The Memorandum to Senator Biden concerning the Civil Justice Reform Act appears in the *Senate Hearings*. *Id.* at 60-75.

150. See 28 U.S.C. § 331 (Supp. II 1990) (defining the membership and functions of the Judicial Conference).

the Civil Justice Reform Act, to raise statutory and constitutional issues concerning Congress's authority to promulgate the legislation, and to recommend modifications of various technical provisions.¹⁵¹ Perhaps because of the awkwardness of the judiciary's taking a definitive position on the legislation's constitutionality in advance of its enactment, the Judicial Conference did not press its case concerning the possible problematic bases of the Act. Indeed, the Conference raised its concerns in vague terms and instead focused on persuading the Senate subcommittee to modify, amend, or eliminate specific provisions in the Act. Although the Senate subcommittee ultimately incorporated many of the Conference's recommendations with regard to specific provisions,¹⁵² it rejected the Conference's statutory and constitutional concerns.¹⁵³

The speed with which the Senate Judiciary Committee drafted and proposed the legislation caught the Judicial Conference unaware of, and unprepared for, the Civil Justice Reform Act.¹⁵⁴ The Conference hurriedly set up a subcommittee to study, analyze, and respond to the legislation. However, by the first legislative hearing on March 6, 1990, the Conference had only partially formed its response. Indeed, the Judicial Conference's initial problem in responding to the bill was that it did not meet until March 13, 1990, a week after the first legislative hearing.¹⁵⁵ The Conference hastily impressed Judge Aubrey E. Robinson Jr., Chief Judge of the United States District Court for the District of Columbia, into service to present the Conference's opposition to the proposed bill.

The Conference fundamentally objected to the Act as an unprecedented congressional intrusion into judicial rulemaking prerogatives. Although asserting this objection only generally at the first hearing, the Conference further elaborated its position in written testimony at successive hearings.¹⁵⁶ For the judges, the Rules Enabling Act transgression was apparent and troubling. During the first day's testimony, Judge Robinson

151. See Peck, *supra* note 27, at 117. But see *supra* note 140 (criticizing Mr. Peck's rendition of events).

152. See *supra* note 94 (identifying the three hearings).

153. See S. REP. NO. 416, *supra* note 3, at 9-13, reprinted in 1990 U.S.C.C.A.N. at 6811-6816.

154. See *Senate Hearings, supra* note 90, at 329 (statement by Judge Robert F. Peckham describing the evolution of the Judiciary's position on the proposed Title I of S. 2648 (Civil Justice Expense and Delay Reduction Plans)).

155. *Id.* at 329-30.

156. *Id.* at 333-35; *House Hearings, supra* note 94, at 125-27.

perceptively pursued the inapt answer supplied in Mr. Head's earlier testimony in response to Senator Biden's question:¹⁵⁷

There is inherent in this also the suggestion that conceding, as some of your former persons who testified this morning did, that this is basically a procedural matter that the bill is dealing with. Why then, why then, we ask, should the congressionally mandated rules enabling act be bypassed?¹⁵⁸

Judge Robinson's rhetorical question is similar to the brief but pointed challenge in his written submission to the Senate subcommittee on behalf of the Judicial Conference:

In addition, there has been a strong reaction that the bill is extraordinarily intrusive into the internal workings of the Judicial Branch. These are procedural matters which should be handled through the normal, Congressionally-mandated Rules Enabling Act process. Many thoughtful Federal judges are very, very uneasy about the signals this bill sends of legislative incursion—albeit well-meaning—in the judicial arena and what it portends for the future.¹⁵⁹

157. See *supra* text accompanying note 148.

158. See *Senate Hearings, supra* note 90, at 212 (statement of Judge Aubrey E. Robinson, Jr.). Judge Robinson's testimony also set forth the concern of the Judicial Conference with the unusual method Congress employed to confer upon itself the rulemaking function:

Then, of course, it has been alluded to, there is a concern about the extent to which this is at least perceived in its initial phase as being intrusive into the internal workings of the judiciary. We recognize our place. You know, we know that there are certain rules and regulations, et cetera, that we have to abide by. But by the same token, there is the perception when, as has been indicated, that we shall, we shall, we shall, and it goes on what we shall do, that this is getting into micromanagement, even though there is the appearance that you are going to do it with the advice and consent of advisory committees.

Id. at 212 (referring to the mandatory requirements the Civil Justice Reform Acts places upon the federal courts through the advisory groups).

159. *Id.* at 221 (prepared statement of Judge Aubrey E. Robinson, Jr. on behalf of the Judicial Conference). Judge Robinson's written responses to questions submitted by members of the Judiciary subcommittee were equally brief on the separation of powers problems inherent in the bill. See *id.* at 289-90. Judge Robinson's written answers also expressed concern over the short time that the Civil Justice Reform Act provided for promulgating plans in the pilot and early implementation districts. *Id.* The suggestion was that this short time period would violate Federal Rule of Civil Procedure 83, which requires public notice and comment periods for new local rules. See *id.* Judge Robinson wrote:

The appropriateness of both the Congressional mandate and the period for implementation are questionable. First, it would be far more appropriate to follow the Rules Enabling Act process provided by Congress. Second, twelve months is an insufficient period of time to implement a mandatory plan as proposed by the bill. The bill contemplates a great deal of input from the bar and public but it does not provide enough time to allow effective participation by these groups. In many cases a complete revision of local rules and practices would

Between March and June 1990, the Judicial Conference, through its subcommittee on the Civil Justice Reform Act, regrouped and strengthened its statutory and constitutional arguments against the legislation.¹⁶⁰ Senator Biden, cognizant of the increasingly strained relations between the judicial branch and his subcommittee concerning the Act, opened the second day of hearings in June by chiding the judiciary for its churlish stance on the bill.¹⁶¹ His opening remarks capture the flavor of the ensuing debate between the two branches over the Act: that of two co-equal branches talking past one another.¹⁶²

Senator Biden simply refused to acknowledge the importance of the judiciary's overriding concern with the proper allocation of rulemaking authority, and its future consequences. Instead, he cast the judiciary as the implacable enemy, waging inflammatory rhetorical warfare, unappeased by legislative compromises on specific substantive provisions of the legislation.¹⁶³ The Judicial Conference, meanwhile, continued to raise

be required and such revisions are normally accomplished after much effort and a longer period of time than provided for in the bill. . . .

It is clearly appropriate for each district court to have a specific civil case management plan. It is our unequivocal belief that if such a plan is to be a requirement, it is best for the Judicial Conference to formulate and impose the requirement.

Id. at 289-90.

160. *See id.* at 330-33; *House Hearing, supra* note 94, at 121-25.

161. Senator Biden stated:

Unfortunately, despite my best efforts and the work of my staff night and day for more than 5 months in negotiating with the task force that the Chief Justice specifically designated to work with us, we will hear today that the Judicial Conference, quote "disfavors the bill."

Given the overwrought response that greeted the legislation initially, I do not find the Conference's position surprising. Of course, I had hoped that by modifying the substance of the bill to meet many, many of the concerns of the Conference, I might persuade them to re-examine their rhetoric.

Regrettably, it now appears that the Conference's objections remain, regardless of the changes in the substance of the bill. I know that we will hear today that there are remaining objections to the bill which will be used to justify the Conference's "disfavor." I think it is time to lay these arguments to rest as well.

Senate Hearings, supra note 90, at 309-10.

162. *Id.* at 307-11.

163. *See id.* at 310. Senator Biden, criticizing the judiciary for using exaggerated rhetoric in its objections, stated:

First, some argue that even though the ideas in the bill are worthy of support on the merits, it is inappropriate for Congress to be legislating them because procedural reform is within the exclusive province of the judiciary. This argument is often cloaked in terms of separation of power.

As a matter of constitutional law, the argument is without merit.

its statutory and constitutional concerns, all the while negotiating for the least intrusive civil justice reform. If it could not win the constitutional rulemaking war, the Conference was determined at least to mitigate the substantive rulemaking damage.

Between the March and June hearings, the Judicial Conference continued to consider the legislation, to present its objections to the Senate subcommittee staff, and to offer its own alternative fourteen-point program for reform.¹⁶⁴ During this period, however, the Senate subcommittee refused to abandon its legislation.¹⁶⁵ When Judge Peckham appeared to testify in June, he again asserted the Conference's two objections: that the Conference's fourteen-point program was a superior way to achieve civil justice reform, and that the Civil Justice Reform Act violated the letter and spirit of the Rules Enabling Act.¹⁶⁶

As the Supreme Court said nearly 50 years ago, quote, "Congress has undoubted power to regulate the practice and procedures of the Federal courts," end of quote.

As a policy matter, the separation of powers argument favors little better. The users of the Federal court system have no means other than through their democratically-elected representatives to express their dissatisfaction with the civil justice system and to demand reform for that system. For too long, we have ignored these cries for change, and this bill finally—and properly, in my view—acts upon their desires.

Id.

164. See *id.* at 330-31 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). Judge Peckham indicated that the Conference continued to have two basic concerns:

(1) responsibility for the kinds of procedural matters covered by S. 2027 should remain in the judiciary, and (2) the most constructive course was not to superimpose nationally one uniform and unproven new system, but to ask each district to assess its own needs and to tailor appropriate responses to them, while simultaneously committing the Judicial Conference to conducting, in a limited number of volunteer courts, carefully designed experiments that would assess the effectiveness of a range of different approaches.

Id. at 330.

165. *Id.* at 331.

166. See *id.* at 316-17 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). Judge Peckham stated:

[T]he executive committee fears that the statute would circumvent the procedures established and recently reendorsed by Congress in the Rules Enabling Act, and set a precedent for unwise departures from the rulemaking process.

We feel that there is a great balance in the provisions of the Rules Enabling Act, that it took 10 years in gestation from 1924 to 1934. And as I indicated, it has been revisited and recently reendorsed. It allows deliberative process at the beginning. It allows comment from judges and scholars and lawyers.

But in the end, of course, the ultimate power is with the Con-

The Judicial Conference's June presentation was tactically interesting. The Conference stressed that Congress itself had only two years earlier revised and strengthened the Rules Enabling Act to require a more open process in judicial rulemaking.¹⁶⁷ Congress had, therefore, recognized and reaffirmed the basic allocation of procedural rulemaking authority to the judicial branch. In addition, the Conference acknowledged that Congress has the power to veto such procedural rules that originate in the third branch, a nod to Congress's democratic, majoritarian function. Perhaps sensing Senator Biden's pique at the Conference's lack of enthusiasm for the bill, the Conference paid due deference to the coordinate legislative branch.

gress, as it should be in a democratic society, to accept the rule, to reject the rule, or to modify the rule, and judges feel very strongly about that, particularly when it relates to procedural matters that go to the core of the performance of their judicial function. And I think that that more than anything else lies at the root of the response of the executive committee and the Conference to the legislation in this way. . . .

Id.

167. See generally Judicial Improvements Act and Access to Justice Act of 1988, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642, 4648-52 (1988) (amending Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (1988)). In making this point, the Judicial Conference could not resist the temptation to point out that while Congress had two years earlier required a more open process and participation in the judicial rulemaking arena, the Senate subcommittee had drafted the Civil Justice Reform Act with even less consultation than Congress required of third-branch rulemaking:

We fear that enactment of this statute could result in real harm to the rule-making process that has served both Congress and the courts so well for so long. As you fully appreciate, Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants into whose world the new rules would intrude are given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforeseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before procedural change is imposed. For reasons we do not understand, Title I of S. 2648 has not been drafted through such a process. Thus one of the primary bases for our opposition to the statute is our belief that nationally applicable procedural norms should be imposed only through that rule-making process.

Senate Hearings, supra note 90, at 333-44 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference).

Most striking, however, the Conference tip-toed around the separation of powers problem. In its June statement submitted to the Senate Judiciary subcommittee, the Conference delicately raised the issue without marshalling constitutional, statutory, or doctrinal arguments to defend its position.¹⁶⁸ The strongest objections the Conference raised at the June 1990 hearing were reduced to two highly generalized points: first, "[t]he legislation would represent unwise legislative intrusion into procedural matters that are properly the province of the judiciary"; and second "[t]he statute would circumvent the procedures established and recently re-endorsed by Congress in the Rules Enabling Act."¹⁶⁹

The Judicial Conference did little to shore up its opposition to the Act between the Senate hearings in June and the House hearing in September. Indeed, the Conference submitted the statement prepared for the Senate to the House subcommittee record.¹⁷⁰ In addition, Judge Peckham simply renewed the Conference's vague, generalized statutory and constitutional opposition to the bill during his appearance before the House subcommittee.¹⁷¹

At the House hearing, Representative Robert W. Kastenmeier, the subcommittee chairman, made one last attempt

168. The Judicial Conference stated:

Some thoughtful judges also have suggested that when Congress considers enactment of legislation that covers the kinds of procedural matters that are at the core of the judicial function, it ventures into areas of constitutional sensitivity. Rather than explore the constitutional arguments that are raised by this suggestion, we wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense.

Id. at 334-35.

169. *Id.* at 348 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). The Judicial Conference also noted that it was "presently implementing a program which will accomplish the purposes of Title I of S. 2648" and argued that the bill would "tend to defeat the aims of cost and delay reduction." *Id.* at 348.

170. There are only slight differences between the statements submitted to the Senate and House. Compare *House Hearing, supra* note 94, at 109-44 with *Senate Hearings, supra* note 90, at 319-48.

171. Judge Peckham stated:

Now, a second reason why the Judicial Conference does not endorse S. 2648 is our concern that the legislation will circumvent the procedures established and recently reendorsed by Congress in the rules enabling act and set a precedent for unwise departures from the rulemaking process. We feel that the provisions of the rules enabling act bring a proper balance between the roles of Congress and the judiciary. It is a deliberative process that begins by allowing the appropri-

to clarify the respective rulemaking roles of Congress and the judiciary. Judge Peckham maintained that the judiciary has authority over procedural rulemaking:

Mr. KASTENMEIER. The primary basis, it appears, for your opposition to the act as a general proposition is that, as you state, nationally applicable procedural norms should be imposed only through, really, the Judicial Conference rulemaking process, rather than legislating court procedures. But aren't there times when it indeed is appropriate for the Congress to legislate court procedures? One case that comes to mind is the mass torts area where the judiciary has in fact supported a legislation process by this committee streamlining the procedures for the consolidation of mass accident cases. Wouldn't that be an exception?

Judge PECKHAM. That relates to the jurisdiction of Federal courts, and we are not contending that through the rulemaking process we can grant jurisdiction, so I would make that distinction.

I think we are talking about purely procedural matters that go to the heart of how a judge conducts his business. That it is most important that the judges have an opportunity to discuss those changes so that they can be harmonized with the entire body of procedural rule. And, as I indicated and as we all know, the process ends in Congress where the ultimate power is.¹⁷²

While this congressional testimony demonstrates the low level of public debate on major legislation, the Judicial Conference's critique of the Civil Justice Reform Act and the Senate's reply suggest the tension between the two branches concerning power and prerogative. Congress's stance, counterpoised with the Judicial Conference's delicate replies, highlight a portrait of separation of powers problems between these two branches. In these exchanges, the legislature and the judiciary do not appear as co-equal branches. Rather, the Conference's testimony was nothing more than a highly deferential minuet with the branch that defines federal court jurisdiction and that can, if it desires, abolish the lower federal courts altogether.¹⁷³

ate advisory committee to propose rules and receive comments from judges, scholars, and lawyers concerning proposed rules.

In the end, the ultimate power is with the Congress to accept, reject, or modify the rule. Judges feel very strongly about judicial involvement in the process, particularly when the subject relates to procedural matters that go to the core of the performance of the judicial function.

I think that as much as anything the bypassing of the rulemaking process lies at the root of the intensely negative response of most Federal judges to the original version of this legislation.

House Hearing, supra note 94, at 105-06.

172. *Id.* at 177.

173. U.S. CONST. art. 1, § 8, cl. 9 (granting Congress the power "[t]o constitute Tribunals inferior to the Supreme Court.").

C. THE DEPARTMENT OF JUSTICE

The Justice Department wavered in its support of the Civil Justice Reform Act.¹⁷⁴ In so doing, it drew Representative Kas-tenmeier's ire for opposing portions of the parallel Federal Courts Study Committee Implementation legislation.¹⁷⁵ Although the Department supported the "tenor" of the Act and its broad reforms, its representative expressed concern with the same constitutional issues raised by the Judicial Conference.¹⁷⁶ In this instance, however, the executive branch seemed somewhat more sensitive to the judicial branch's prerogatives than to the legislature's. The Justice Department specifically identified a separation of powers problem if only to make the additional point that the doctrine required the executive branch to defer to the superior legal interpretation of the judiciary.¹⁷⁷

The Justice Department's written statement repeated its polite questioning of the Act's constitutional basis.¹⁷⁸ Stuart Gerson, the Department's representative, testified that the major problem with the Civil Justice Reform Act was "manda-

174. See *House Hearing, supra* note 94, at 182-214 (testimony and prepared statement of Stuart Gerson, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice).

175. *Id.* at 211.

176. See *infra* note 178 (quoting Mr. Gerson).

177. Some of the things we have had to say relating to imposing management systems upon the judiciary I think have been adequately and exemplarily covered by Judge Peckham, who I think has it about right on the constitutional basis, and we largely defer because of our concerns about separation of powers to what the judiciary has to say about the management of the judiciary. I think Judge Peckham had it exactly right when he answered the chairman with respect to the difference between management controls and jurisdictional perimeters. Hence, as the chairman is aware, we greatly support the proposal with respect to the consolidation of multiparty, multidistrict mass tort cases. That is a jurisdictional matter. We think it is appropriate. . . . And that is the reason we can support it while we oppose on separation of powers grounds the mandation of certain management controls upon the Federal district and courts of appeals, though we think they are a pretty good idea, and that with the participation of the Judicial Conference and others they will be adopted at least in spirit and probably in significant detail.

House Hearing, supra note 94, at 183 (testimony of Mr. Gerson).

178. See *id.* at 187-210. The written statement applied also to H.R. 5381, the Federal Courts Study Committee Implementation Act of 1990. *Id.* at 187. Again, the written statement suggested possible constitutional problems only in generalized terms:

As I describe the Department's views on these important pieces of legislation, and renew our commitment to working with the Judiciary and the Congress on judicial reform legislation, I must reiterate an important Administration policy. We are guided by a healthy respect for the Constitution's separation of powers. This respect leads

tion." Mr. Gerson stated, "We are in favor of many of those things. Some of them constitutionally can be mandated. Some of them can't, and I think where we have objection, it is in that. It is of constitutional concern."¹⁷⁹ Finally, Representative Kastenmeier directly raised the constitutional issue:

Mr. KASTENMEIER. Do you think there are constitutional concerns with the original bill?

Mr. [STUART] GERSON. Yes.¹⁸⁰

Similar to the Judicial Conference, the Justice Department raised the constitutional separation of powers issue but neither developed the argument nor pursued the point. During three days of hearings and open record, only the American Bar Association made an attempt to supply some content to the constitutional objection to the Civil Justice Reform Act.

D. THE AMERICAN BAR ASSOCIATION

During spring 1990, the American Bar Association formed

us to refrain from commenting on a number of provisions in these bills that we regard as internal and native to the Judicial Branch. . . .

We similarly believe that it is unwise to impose detailed statutory controls on the internal operations of the Judicial Branch in the exercise of its constitutional authority. Congress, however, may wish to adopt measures that facilitate the exercise of that authority by extending to the courts additional tools or resources with which to improve the administration of justice.

Id. at 188-89.

179. *Id.* at 213 (responding to Rep. Kastenmeier's question whether the Justice Department was supporting the Biden bill, the Civil Justice Reform Act). Mr. Gerson's response is interesting because it reiterates the constitutional objection:

We are in accord with much that is stated in that bill, as it has been improved and now exists, and I have covered many of those things in the written testimony. We very much subscribe to its tenor. Our trouble is with mandation. For example, we support the idea of the district plan. We think it is good, and that it would be beneficial to have nationwide uniformity. There ought to be deference to the Federal Rules of Civil Procedure. We think that the district courts ought to have a central advisory group to deal with such issues. We are in favor of case-tracking systems. The Attorney General has testified in favor of them before the Federal Courts Study Committee.

. . . We don't think that the legislature can manage the cases and dockets of the Federal district courts directly. We think that they do a great deal in defining their jurisdiction, in defining venue, in defining the rules under which cases are decided, but we think also that most of the ideas that are incorporated in that bill are laudable. Some of them ought to be modified.

Id. at 213 (omitted portions quoted in text).

180. *Id.* at 213. That was the end of the colloquy. Mr. Gerson did not elaborate further on the Justice Department's views on the constitutional problems with the bill.

a "Civil Justice Coordinating Committee" to study and analyze the Civil Justice Reform Act in order to recommend to the ABA Board of Governors what portions of the Act to support or oppose.¹⁸¹ The committee's memorandum to the ABA Board of Governors, incorporated into the Senate record, reflected the committee's discussion of and division over the statutory and constitutional authority of Congress to implement the legislation.¹⁸²

In this memorandum, the ABA supplied the only doctrinal support in the record for the theory that the Act was a questionable assertion of congressional legislative rulemaking power.¹⁸³ While no ABA representatives appeared during the spring Senate hearings, they appeared in September 1990 to testify before the House subcommittee considering the Act and

181. See Memorandum from The Civil Justice Coordinating Committee to the Board of Governors of the American Bar Association (June 9, 1990), reprinted in *Senate Hearings, supra* note 90, at 481-91 [hereinafter ABA Memorandum].

182. There were, however, two broader constitutional and philosophical issues where there was no solid consensus of our Committee. Rather than deciding them by narrow margins, or identifying which individual members held a particular view, we thought it would be more helpful to the Board in its deliberations to simply acknowledge them The first issue was the constitutional, or philosophical, question of whether Congress can, or should, pass legislation that mandates a particular form of case management, or should instead leave details of case management to the discretion of the courts within the framework of the Federal Rules of Civil Procedure. On this issue a majority of the Committee did not believe that we could determine whether the revised bill was constitutional or unconstitutional on its face. While several members were firm in their views on each side of the question, a majority concluded the issue was too complex for easy resolution given the time constraints for our deliberations. All recognize, however, that legislation mandating procedures implicates separation of power[s] concerns.

Id. at 483-84.

The second issue raised by the ABA was whether it should oppose the legislation if Congress did not make the language modifications, intended to address the separation of powers problem, suggested in Part III of the ABA's memorandum. See *id.* at 488-89.

183. We recognize that for the Congress to express its concern and to require the development of cost and delay reduction plans is appropriate. However, while it is within the power and province of the Congress to enact rules and proscribe jurisdiction of the federal courts, to dictate to the courts how they should conduct their internal business—as distinguished from establishing rules of procedure—implicates the separation of powers doctrine. . . . Moreover, sound public policy suggests that the rule-making process should be in accordance with the Rules Enabling Act.

Id. at 489 (citations omitted).

the Federal Courts Study Implementation legislation.¹⁸⁴ At this hearing, the ABA renewed its constitutional objections to the Act by stating the separation of powers problem and arguing that Congress overstepped its rulemaking authority delineated in the Rules Enabling Act.¹⁸⁵

E. OBSERVATIONS ON THE LEGISLATIVE TESTIMONY

Congressional discussion of the statutory and constitutional issues relating to the Civil Justice Reform Act was embarrassingly superficial, ill-informed, and trivial. It is sobering to realize that almost everyone who testified before the Senate and House subcommittees was a lawyer or judge, that the staffers who drafted the legislation were lawyers, and that the chief

184. See *House Hearing*, *supra* note 94, at 241-47 (statement of Robert Landis, Former Chair, ABA Standing Committee on Federal Judicial Improvements, and statement of George C. Freeman, Jr., Chair, ABA Business Law Section).

185. *Id.* at 266-70 (prepared statement of George C. Freeman, Jr., on behalf of the ABA). Mr. Freeman stated:

Public policy suggests that the rule-making process should be carried out in accordance with the Rules Enabling Act. The orderly process established by the Act, which has functioned extraordinarily well, leaves the details of case management to the discretion of the courts, within the framework of the Federal Rules of Civil Procedure.

Id. at 267.

The exchange between Representative Kastenmeier and Mr. Freeman revealed that the ABA committee was prompted by its member judges to consider further the separation of powers problem.

Mr. KASTENMEIER. Mr. Gerson suggested that there could be constitutional problems with the original concept presented. We do not know that legislation regulating procedures by which cases are litigated in the Federal courts have survived a constitutional challenge in the courts. Why do you think that legislation regulating the procedures by which cases are scheduled for litigation in the courts presents more serious problems, more serious separation of powers problems than this?

Mr. FREEMAN. Well, I will explain that, sir. In the ABA when we found ourselves at odds over this, the president of the ABA appointed an eight-person committee, and for some strange reason he made me the chairman of it. I suddenly found that I was one of the four practicing lawyers of that committee and the other four members were sitting judges. At our initial meetings I think I observed, not having done my homework, that at least we don't have a constitutional problem here. The judges took me to task, and I said, "Well, why don't you all send us cases which you think raise these concerns?" They do, and they are cited in my testimony. And I will simply in a sentence or two explain their relevance and why I think there is a question. I don't think that these cases are dispositive, but they urge caution.

Id. at 282 (subsequent description of cases omitted).

congressional sponsors were lawyers. Surely they all knew better.

The Act's record demonstrates the debasement of public policy discourse at the national level. The Act is a major piece of legislation mandating massive procedural reform throughout the entire United States, but its legislative hearings reflect a paucity of considered reflection on its impact and on congressional authority to order such reform. What the legislative record does reflect is the single-minded determination of Senator Biden, his Senate subcommittee, and his staff to enact this legislation, despite repeated (albeit half-hearted) statutory and constitutional challenges from the other two branches of government and the leading organization of American lawyers.

The record also reflects little efficient opposition to the Act. The Judicial Conference, the Justice Department, and the American Bar Association weakly asserted and poorly developed their statutory and constitutional challenges. Other witnesses, most notably federal judges testifying individually or on behalf of various judicial organizations, appeared at the Senate and House subcommittee hearings to raise questions about the Act's constitutional basis.¹⁸⁶ These individuals, however, merely suggested that the Act constituted an unusual incursion into third branch affairs.¹⁸⁷

Typically, the federal judges appeared shy about developing an extended constitutional argument that opposed the bill. Because the judges may someday be called upon to construe the Act's constitutionality,¹⁸⁸ the Act raised the specter of the federal judiciary offering Congress an advisory opinion on legislation affecting judicial branch affairs. Apart from the statutory and constitutional questions relating to the allocation of rulemaking authority, the Act's legislative hearings highlight the general problems that the judicial branch faces when testifying on pending legislation.¹⁸⁹

186. See *id.* at iii (listing witnesses); *Senate Hearings, supra* note 90, at iii (same).

187. See *supra* note 94 (witnesses testifying in the *Senate Hearings*).

188. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (construing constitutionality of the United States Sentencing Commission Guidelines).

189. See, e.g., *Court Reform and Access to Justice Act Hearings, supra* note 97, at 3-52 (testimony and prepared statement of Judge Elmo B. Hunter, Committee on Court Administration, Judicial Conference of the United States); *id.* at 312 (testimony and prepared statement of Judge Abner J. Mikva); *id.* at 312 (testimony and prepared statement of Judge Patrick Higginbotham); *id.* 901-82 (letters from various judges); see also *The Multiparty, Multiforum Jurisdiction Act of 1989: Hearing on H.R. 3406 Before the Subcomm. on Courts, Intel-*

The American Bar Association arguably supplied the most thoughtful presentation of the constitutional problems relating to the bill, but even its analysis was thin and tentative. When the legislative record for the Civil Justice Reform Act closed during fall 1990, there was very little explication either of the Rules Enabling Act limitations or the separation of powers arguments as they related to the ability of Congress to enact the bill. Congress passed the Act on this weak record and the official legislative history asserted the exclusive rulemaking authority of Congress enact this law.¹⁹⁰

III. SENATE JUSTIFICATIONS FOR EXCLUSIVE CONSTITUTIONAL AUTHORITY TO ENACT THE CIVIL JUSTICE REFORM ACT OF 1990

The Senate repeated its justification for Congress's statutory and constitutional authority to enact the Civil Justice Reform Act in three different sources: a Senate Judiciary subcommittee staff memorandum to Senator Biden which was included in the first Senate hearing record,¹⁹¹ the official Senate Report accompanying the final bill,¹⁹² and a subsequent law review commentary by the staff director for the Senate Judiciary subcommittee.¹⁹³ These sources contain essentially the same broad arguments to justify the Act—one based in statutory and constitutional law, the other on public policy.

The Senate's basic position is that Congress, as a matter of statutory and constitutional law, has exclusive rulemaking authority. As a policy matter, Congress asserted that it has the ability, if not the duty, to act when the judicial branch is not moving quickly enough to achieve civil justice reform. Despite the simple structure of these arguments, the Senate's official report attacked the Judicial Conference's objection based on the Rules Enabling Act as an argument "cloaked in separation

lectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 17-20 (prepared statement of Judge William W. Schwarzer representing the Judicial Conference of the United States).

190. S. REP. NO. 416, *supra* note 3, at 10-11, *reprinted in* 1990 U.S.C.C.A.N. at 6813.

191. *See supra* note 149 and accompanying text.

192. S. REP. NO. 416, *supra* note 3, *reprinted in* 1990 U.S.C.C.A.N. 6802. "The House bill was passed in lieu of the Senate bill after amending its language to contain much of the text of the Senate bill." 1990 U.S.C.C.A.N. at 6802.

193. Peck, *supra* note 27, at 114-17.

of powers terms.”¹⁹⁴ The fact that the Senate repeated this derogatory characterization in the official Senate Report indicates the dismissive treatment afforded this argument in the legislative hearings and in the final committee report.¹⁹⁵ Alternatively, the Senate’s repeated negative characterization of the Judicial Conference’s objection may reveal the powerful challenge that the separation of powers argument presented to Congress.

This Part sets out the Senate’s view of the allocation of rulemaking authority and provides the basis for a critical examination of Congress’s arguments.¹⁹⁶ It argues that the Senate’s position consists of selective quotations from case precedent, distorted statutory construction, and argumentative *non sequiturs*. This Part ultimately assesses whether Congress reasonably concluded that the separation of powers argument regarding rulemaking was a diversionary argument without merit, and that the Rules Enabling Act prohibited the judiciary from promulgating civil justice reform through its own rulemaking powers.

A. THE SENATE VERSION OF THE ALLOCATION OF RULEMAKING AUTHORITY

The Senate’s position relating to its rulemaking authority centered on five basic points. First, the Senate contended that Congress’s historical delegation of rulemaking authority to the Supreme Court did not lessen its own rulemaking authority, and furthermore, that the Supreme Court cases construing rulemaking authority have affirmed congressional power to regulate practice and procedure in the federal courts. Second, the Senate argued that only the Constitution, and not the Rules Enabling Act, limited congressional power to enact procedural rules. Third, the Senate offered numerous examples of when Congress has exercised rulemaking power, and, fourth, argued that the Rules Enabling Act barred the Supreme Court from proposing the Civil Justice Reform Act. Fifth, the Senate contended that its spending powers justified the legislation. As

194. S. REP. NO. 416, *supra* note 3, at 9, reprinted in 1990 U.S.C.C.A.N. at 6811.

195. In a subsequent law review commentary, the staff director for the Senate Judiciary Committee also characterized the objectives as “cloaked in separation of powers terms.” Peck, *supra* note 27, at 114.

196. This discussion is based on the Senate Report, *supra* note 3, with occasional parallel citations to the same or similar assertions in the staff memorandum and the staff director’s commentary.

this Article suggests, the Senate's position consisted of an odd melange of debating points that stood the Rules Enabling Act on its head and changed this statute from an "Rules Enabling Act" to a "Rules Disabling Act."

1. Historical Delegation of Rulemaking Power to the Judicial Branch

Although the Senate acknowledged that Congress has "delegated some rulemaking authority to the courts," it also steadfastly maintained that this delegation did "not lessen the rulemaking power conferred on Congress by the Constitution."¹⁹⁷ The Senate cited as support for this proposition two Supreme Court cases, *Sibbach v. Wilson & Co.*¹⁹⁸ and *Hannah v. Plumer*,¹⁹⁹ and a quotation from a federal district court judge.²⁰⁰

The Senate's sources are unconvincing on the rulemaking allocation issue. The excerpted sources merely state that while Congress has the power to regulate federal practice and procedure, it can exercise that power by delegating it to the courts.²⁰¹ The delegation point is a rhetorical red herring because it says nothing about the allocation of rulemaking authority with reference to exercise of the delegation, particularly with reference to rule content. It is true that Congress may delegate rulemaking power without lessening its ability to exercise *some* rulemaking authority. That Congress may delegate its rulemaking power, however, does not lessen the ability of the federal judiciary to exercise its own statutorily assigned rulemaking authority delineated in the Rules Enabling Act.

Delegation power really reveals nothing, unless one construes it to mean that whatever Congress can delegate it can deny altogether. If this is so, then Congress must repeal its own Rules Enabling Act, which statutorily sets forth the rela-

197. S. REP. NO. 416, *supra* note 3, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6812.

198. *Id.* (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)).

199. *Id.* (citing *Hannah v. Plummer*, 380 U.S. 460 (1964)).

200. *Id.* at 10, *reprinted in* 1990 U.S.C.C.A.N. at 6812 (citing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 90 (1977)). Although the Senate Report states that "[t]he Supreme Court's consistent and long-standing recognition of congressional rulemaking authority has produced broad agreement on this point among leading scholars in the field," the Senate report cites no other scholar for this proposition other than Judge Jack Weinstein. *See id.*

201. *See* S. REP. NO. 416, *supra* note 3, at 9-10, *reprinted in* 1990 U.S.C.C.A.N. at 6812 (quotations from *Sibbach* and *Hannah*).

tive spheres of rulemaking authority between Congress and the federal courts. The Senate's argument is flawed because it establishes a principle of rulemaking allocation without reference to rulemaking content. Thus, the Senate's position fails to recognize that the Rules Enabling Act has clearly assigned *substantive* rulemaking power to Congress and *procedural* rulemaking power to the federal courts. In essence, then, the Rules Enabling Act governs and limits congressional rulemaking power.

Further, that federal courts have for more than fifty years recognized joint rulemaking authority and Congress's delegation power, says nothing about Congress's superior rulemaking authority absent any reference to rule content. Without an outright repeal of the Rules Enabling Act, the delegation power of Congress certainly does not support its claim to exclusive rulemaking authority.

Finally, the Senate's reliance on a 1926 report²⁰² concerning the then-proposed Rules Enabling Act undercuts, rather than supports, its position. The earlier report states:

[T]he bill proposed [the Rules Enabling Act] will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. * * * It gives to the court the power to initiate a reformed [f]ederal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.²⁰³

The 1926 Rules Enabling Act report suggests that the Act's drafters did not expect Congress to relinquish its "constitutional" role. The report, however, also specifies what that role was: exercising a legislative veto over the judicial branch's proposed rule reforms.²⁰⁴ The report states that federal procedural

202. *Id.* at 9-10, reprinted in 1990 U.S.C.C.A.N. at 6812 (citing S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926)).

203. *Id.* (quoting S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926)). See *infra* note 204 for correct citation.

204. See *id.* (quoting S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926) to support the argument that Congress retained the power to "amend," "repeal," or "correct" the judiciary's reforms). The Senate Report for the Civil Justice Reform Act omitted important language from the 1926 report. This Report states that Congress retained the power to "revise rules proposed by the Supreme Court, or by legislation . . . modify or entirely withdraw the delegation of power to that body." See S. REP. NO. 1174, 69th Cong., 1st Sess. 7 (1926). The 1926 report continues on to explain:

But it is proper in this connection to say that where the entire responsibility for formulating rules of procedure has been delegated

reform, under the Rules Enabling Act, was to "initiate" in the judicial branch. The Senate's 1990 interpretation of its rulemaking authority, as well as its reading of the 1926 legislative history of the Rules Enabling Act, is inconsistent with the actual 1926 version of rulemaking allocation.²⁰⁵

2. The Rules Enabling Act and Congressional Authority to Promulgate Rules

The Senate's next argument in support of its assertion of exclusive rulemaking authority consisted of three statements²⁰⁶ together forming an unconvincing, if not illogical, syllogism. First, the Senate stated that the Supreme Court's authority to enact rules of procedure was far more limited than that of Congress because the Court only has the authority delegated to it in the Rules Enabling Act. Second, the Senate stated that the Court had the power to propose only procedural rules—i.e., those with no substantive effect.²⁰⁷ Third, the Senate stated that congressional authority to prescribe procedural rules was limited only by the Constitution, and not by the Rules Enabling Act. The Senate concluded that Congress could enact procedural rules to advance its substantive policy goals.²⁰⁸

The Senate stated these contentions in two passages in the legislative history of the Civil Justice Reform Act. The Senate relied on a House report that accompanied the 1988 congressional revisions to the Rules Enabling Act to describe the scope of its exclusive rulemaking authority: "[the Rules Enabling Act] is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily and obviously *require consideration*

to the courts, the tendency has been to allow such rules to stand without amendment by legislative bodies. The reason for this is that it is convenient for the legislature to refer proposed changes to the courts because they are found to be better equipped to consider them.

Id. The Report then provides a historical context for this "tendency," citing experiences in several states and England. *See id.*

205. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing extensive legislative history of Rules Enabling Act).

206. *See* S. REP. NO. 416, *supra* note 3, at 10, *reprinted in* 1990 U.S.C.C.A.N. at 6813.

207. Non-procedural rules run afoul of the Rules Enabling Act by "abridg[ing], enlarg[ing], or modify[ing] substantive right[s]." *Id.* (quoting 28 U.S.C. § 2072).

208. *Id.* (noting that "[s]uch rules define the area of court rulemaking that is allowed to Congress, but prohibited to the Supreme Court.").

of policies extrinsic to the business of the courts."²⁰⁹ Further, the Senate stated that "[i]mportantly, the report also refers to Congress[s] exclusive power to enact procedural rules that 'affect its constituencies in their out-of-court affairs.'" ²¹⁰

These two crucial passages in the Civil Justice Reform Act's legislative history completely redefined the rulemaking allocation between the two branches. Prior to the Act, the crucial conceptual distinction relating to the allocation of rulemaking authority was between substantive and procedural matters.²¹¹ However difficult this distinction has proven in theory and application, it nonetheless has been the conceptual paradigm for defining each branch's rulemaking authority.²¹²

The Senate's legislative history to the Civil Justice Reform Act articulated new glosses on the Rules Enabling Act that empowered Congress to promulgate procedural rules in new situations. This novel interpretation allows Congress to enact procedural rules where any rulemaking choice "requires consideration of policies extrinsic to the business of the courts" or "affect[s] its constituencies in their out-of-court affairs."²¹³ These formulations are different and more expansive than the existing substance/procedure distinction and obviate any notion of a purely procedural rule. Stated differently, it is difficult to think of a purely housekeeping procedural rule that could not be construed to require consideration of some policy extrinsic to the business of the courts or that may not affect some Congressperson's constituency in out-of-court affairs. With these two operative definitions, then all rulemaking is within the Congress's province (which is exactly the Senate's point). By definitional fiat, the Senate has thus arrogated to Congress all procedural rulemaking authority.

209. *Id.* at 10-11, reprinted in 1990 U.S.C.C.A.N. at 6813 (citing H.R. REP. NO. 422, 99th Cong., 1st Sess. 22 (1985) (emphasis added)).

210. *Id.* (citing H. R. REP. NO. 422, 99th Cong., 1st Sess. 22 (1985)) (emphasis added).

211. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 386-87 (1989); *Hannah v. Plumer*, 380 U.S. 460 (1965).

212. See *supra* notes 198-99.

213. See *Mistretta*, 488 U.S. 361. See generally Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281 (examining the meanings of "substance" and "procedure" in evaluating the effect of the supercession clause of the Rules Enabling Act); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989) (response to Professor Carrington).

3. Past Congressional Exercises of Rulemaking Authority

The third argument the Senate advanced to support its contention that Congress has exclusive rulemaking authority relies on circular logic: the Senate contended that Congress must have that power because it had on previous occasions exercised that power. Each example of the use of such authority, such as the Speedy Trial Act,²¹⁴ the Federal Rules of Evidence, and the multi-district litigation statute,²¹⁵ however, is problematic and hardly supports the Senate's categorical claim to exclusive procedural rulemaking authority.

The Speedy Trial Act is arguably the Senate's best example of the plenary exercise of congressional "procedural" rulemaking authority.²¹⁶ Nonetheless, the Speedy Trial Act is not a compelling example because that Act's intrusion into the federal courts' internal affairs is minimal compared to those the Civil Justice Reform Act requires.²¹⁷ The Speedy Trial Act concerned only the timing of criminal cases and did not mandate that prosecutors, defense lawyers, victims, and criminals, the system's "users," effect complete reform of the federal criminal procedure system. Moreover, the Speedy Trial Act, which deprives federal courts of jurisdiction over criminal cases that are not prosecuted after a certain length of time, is essentially jurisdictional in nature.²¹⁸

In addition, as the Senate itself concedes, Federal Rule of Criminal Procedure 50(b), proposed by the Supreme Court, preceded the Speedy Trial Act. Congress's dissatisfaction with the Supreme Court's rule prompted Congress to enact its own version,²¹⁹ an exercise of power that is within the scope of Con-

214. S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.C.A.N. at 6813 (citing 18 U.S.C. § 3152).

215. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. at 6814 (citing 28 U.S.C. § 1407). The original Senate staff memorandum in support of the constitutionality of the Civil Justice Reform Act did not refer to the multidistrict litigation statute; it only cited the Speedy Trial Act and the Federal Rules of Evidence. *See supra* note 149 and accompanying text (Memorandum to Sen. Joseph R. Biden).

216. The Senate would have a better example of the exercise of independent congressional rulemaking authority in the 1983 enactment of the revised Federal Rule of Civil Procedure 4. *See* Mullenix, *supra* note 8, at 844-46.

217. *See, e.g.*, 18 U.S.C. § 3161(c)(1) (1988) (providing that criminal defendant must be brought to trial within seventy days from the filing of an information or indictment, or from the date defendant has appeared before a judicial officer of the court in which the charge is pending).

218. *See supra* note 114.

219. Seeking to press the analogy to the Civil Justice Reform Act even further, the Senate legislative history suggests that Congress enacted its own ver-

gress's authority to "amend," "repeal," or "correct" a pre-existing Court-proposed rule.²²⁰ The Speedy Trial Act illustrates the exercise of a congressional legislative veto over a Court-proposed rule revision; it does not illustrate congressionally-initiated wholesale reform of an entire procedural system.

The enactment of the Federal Rules of Evidence, falling as it does somewhere in the "twilight area" between substance and procedure, is an even more problematic illustration of Congress's alleged exclusive rulemaking authority.²²¹ Significantly, between the legislative hearings on the Civil Justice Reform Act and the final Senate report, the Judiciary Committee's arguments based on enactment of the Federal Rules of Evidence disappeared from the official legislative record. Perhaps this is in no small part because the Senate staff memorandum quotes Justice Douglas dissenting from the Supreme Court's proposed Rules of Evidence regarding the relative allocation of rulemaking authority:

I can find no legislative history that rules of evidence were to be included in 'practice and procedure' as used in [the Rules Enabling Act] The words 'practice and procedure' in the setting of the Act seem to me to exclude rules of evidence. They seem to me to be words of art that describe pretrial procedures, pleadings, and procedures for preserving objections and taking appeals.²²²

Justice Douglas suggests in his dissent that evidentiary rules relate more to the substantive elements of a claim than to pure procedure. Although his statement takes the rules of evidence outside the purview of judicial promulgation, it quite precisely makes the definitional case that procedural rulemaking belongs within the scope of judicial authority. Since the Civil Justice Reform Act is almost exclusively concerned with pre-trial procedures, Justice Douglas's statement undercuts the

sion of the Speedy Trial Act because implementation of the Act might have required additional court resources in the form of new judges, clerks, and computers. See S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.A.N. at 6814 (citing to H.R. REP. NO. 1508, 93rd Cong., 2d Sess. (1974)).

220. See *supra* note 204. Similarly, when Congress was dissatisfied with the Civil Rules Advisory Committee's 1983 proposed amendment of Federal Rule of Civil Procedure 4, relating to service of process, it substituted its own version. This unprecedented, unilateral congressional amendment of a Federal Rule of Civil Procedure subsequently turned out to be a poor revision, necessitating further remedial amendment by the Advisory Committee on Civil Rules. See Mullenix, *supra* note 8, at 845.

221. See *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

222. *Senate Hearings*, *supra* note 90, at 67 (quoting Letter from Justice Douglas dissenting from the Supreme Court's proposed Rules of Evidence (October Term 1972)).

very position the Senate advances in support of Congress's exclusive rulemaking authority.

Finally, the multi-district litigation statute is an equally dubious illustration of exclusive congressional rulemaking authority. The multi-district litigation statute is a federal transfer provision, concerned with venue and consolidation. Although it is not technically a jurisdictional provision, the multi-district litigation statute is jurisdiction-like in that it confers temporary jurisdiction on a federal forum to conduct consolidated pretrial proceedings in specially-designated multidistrict litigation cases.²²³ Even the federal judges appearing on behalf of the Judicial Conference conceded that Congress has exclusive authority to enact jurisdictional legislation.²²⁴ In addition, like the Speedy Trial Act, the multi-district litigation statute did not effect an entire wholesale revision of the Federal Rules of Civil Procedure.

4. The Rules Enabling Act, the Supreme Court, and the Civil Justice Reform Act of 1990

The Senate's fourth argument for its superior rulemaking authority was that the Rules Enabling Act, in addition to affirmatively requiring Congress to enact the Civil Justice Reform Act, barred the Supreme Court from proposing such legislation.²²⁵ The Senate, in support of this position, relied on two of its own definitions of the scope of congressional rulemaking authority: initiatives that affect "constituencies in their out-of-court affairs" and those that involve "policies extrinsic to the business of the courts."²²⁶

The Senate then characterized the Civil Justice Reform Act as having the "substantive goals" of increasing access to the

223. See 28 U.S.C. § 1407 (1988).

224. See *House Hearing*, *supra* note 94, at 105-06. Indeed, the proposed Multi-Party, Multiforum Jurisdiction Acts of 1989, 1990 and 1991 all were proposed revisions of the multidistrict litigation act. One of the specific purposes of the proposed new Multi-Party, Multiforum statutes was to correct the jurisdictional deficiencies inherent in the existing multi-district litigation statute, in order to supply a minimal diversity concept to transfers. See *supra* note 189.

225. The legislative history states this proposition by way of conclusion: "The Civil Justice Reform Act is within the exclusive rulemaking authority of Congress. Indeed, the limitations of the Rules Enabling Act would bar the Supreme Court from proposing this legislation." S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.C.A.N. at 6814.

226. See *supra* notes 209-10.

federal courts²²⁷ and improving the efficiency and competitiveness of American business.²²⁸ These substantive goals, according to the Senate, affect constituencies in their out-of-court affairs and involve policies extrinsic to the business of the courts. Hammering home its final nail, the Senate's legislative history declared: "A proposal intended to increase access to the courts and to improve the productivity and competitiveness of American business cannot fairly be described as purely procedural."²²⁹

This argument is conclusory, circular, and illogical. Whatever may be the "substantive" goals of any congressional legislation, these goals say little about whether the content of the legislation is substantive or procedural. The Senate asserted a power to enact the Civil Justice Reform Act by simply formulating an entirely new and expansive definition of "substantive" matters and then miraculously transformed matters that previously were understood as purely procedural into substantive matters and goals.²³⁰ One must concede the Senate's recasting of the substance/procedure distinction in order to conclude that the Rules Enabling Act affirmatively prohibits the Supreme Court from enacting like legislation.

The Senate's reasoning represents a peculiar inversion of the long-standing interpretation of the Rules Enabling Act²³¹

227. A controversial aspect of the Civil Justice Reform Act is whether it will actually increase access to the federal courts, as the legislative history asserts, or whether it will impede the access for certain litigants and types of cases. Certainly, with a strong emphasis on implementation of case tracking systems and alternative dispute resolution mechanisms, *see supra* notes 10-12, the Civil Justice Reform Act is arguably intended to shunt certain cases and litigants out of federal courts.

228. *See* S. REP. NO. 416, *supra* note 3, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6814. This portion of the legislative history is also subject to challenge and debate on empirical grounds. *See supra* notes 129-31.

229. S. REP. NO. 416, *supra* note 3, at 12 *reprinted in* 1990 U.S.C.C.A.N. at 6815.

230. The Senate Report adds that the standards governing legislative initiatives like the Civil Justice Reform Act require "the accountability and give and take of the legislative process." *See id.* (citing Mary K. Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 691 (1988) (recommending "legislative solutions" when "political interests demand intervention")). It is a thesis of this Article that the politicization of the federal procedural rulemaking process is highly undesirable and is contrary to the longstanding ethos of the federal rules. *See Mullenix, supra* note 8, at 855-57.

231. *See, e.g.,* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (stating that the Rules Enabling Act "was purposely restricted in its operation to matters of pleading and court practice and procedure"); *Hannah v. Plumer*, 380 U.S. 460,

and its allocation of rulemaking authority between the two branches. The Senate's analysis changes the statute from one that, by congressional delegation, *enables* the judiciary to promulgate federal rules of practice and procedure into an Act that *disables* the federal courts from performing this function. Congress, by obliterating any meaningful distinction between substance and procedure in the Civil Justice Reform Act's legislative history, usurps procedural rulemaking authority.

5. The Funding Theory of Congressional Authority

The Senate based its final claim to exclusive authority to enact the Civil Justice Reform Act on its authority to fund the measure. The Senate stated that this authority "is found in the bill's authorization of funding to accomplish its purposes,"²³² and argued that its authorization of \$25 million dollars to provide resources to early implementation districts "necessarily require[s] considerations uniquely within the province of Congress."²³³

This is a bootstrap argument. That Congress may, through a bill, authorize funding to accomplish its purposes cannot also be used as the basis of its authority to enact the legislation. Stated differently, Congress cannot legitimize every assertion of legislative power through a funding provision. Congressional power to authorize funds to carry out properly enacted statutes says nothing about its power to enact that legislation in the first place, or about constitutional and statutory allocation of rulemaking authority. Although Congress can condition the spending of funds authorized for a lawful purpose, it cannot imply the lawfulness of an authorization from the fact of its existence.

B. THE SENATE VERSION OF THE SEPARATION OF POWERS DOCTRINE AND RULEMAKING AUTHORITY

Significantly, the entire legislative history of the Civil Justice Reform Act says nothing about the separation of powers doctrine. The Senate only referred to the doctrine in passing

471 (1965) (stating that the Rules Enabling Act generally directs federal courts to apply state "substantive" law and federal "procedural" law).

232. See S. REP. NO. 416, *supra* note 3, at 12 reprinted in 1990 U.S.C.C.A.N. at 6815 (characterizing this as "[a]nother clear indication that the Civil Justice Reform Act is within the exclusive rulemaking authority of Congress . . .").

233. *Id.* The Senate advanced a similar funding argument in support of congressional authority to enact the Speedy Trial Act. See *supra* note 149 and accompanying text (Memorandum to Sen. Joseph R. Biden, Jr.).

when it briefly mentioned that any Rules Enabling Act challenges to the Civil Justice Reform Act were "most often cloaked in separation of powers terms" and were without merit.²³⁴ Further, the Senate report, even though it counters the Rules Enabling Act theory with two Supreme Court citations,²³⁵ fails to address the separation of powers argument that the American Bar Association presented in the last legislative hearing.²³⁶ Thus, while the Senate's Rules Enabling Act analysis is paltry, its separation of powers discussion is nonexistent.²³⁷

The Senate's dereliction is interesting for at least three reasons. First, it suggests the inability of the Senate to distinguish the Rules Enabling Act question, as a matter of statutory allocation and delegation, from the more fundamental question of a constitutional separation of the legislative and judicial branches.

Second, the Senate Report's characterization of the separation of powers doctrine as a "cloaked" argument is a transparent rebuke of the Judicial Conference, the chief institutional group that opposed the legislation and repeatedly raised the argument. The Senate's blatant reproach of the judiciary, its heavy-handed usurpation of procedural rulemaking authority, and its dismissive attitude toward a fundamental constitutional question, embody the very tension that the principles of constitutional separation of powers seek to resolve.

Third, the failure of the Senate to address the separation of powers problem suggests either an act of omission or commission. On the one hand, the failure to analyze the separation of powers problem could be interpreted as ignorance or disregard. Stated somewhat differently, perhaps the Senate just did not get it. On the other hand, a more disturbing possibility is that the Senate did get it, but did not like the consequences for procedural rulemaking and speedy civil justice reform.

234. See S. REP. NO. 416, *supra* note 3, at 9, reprinted in 1990 U.S.C.C.A.N. at 6811.

235. See *supra* notes 198-200.

236. See *supra* notes 181-85 and accompanying text.

237. This Article's companion piece discusses whether the separation of powers argument has any independent legal merit apart from the statutory Rules Enabling Act problem. Whatever the weight of that theory, the separation of powers problem is nonetheless present in the basic question of whether Congress has the ability to enact the Civil Justice Reform Act. The official legislative history tells us that the Senate simply chose to ignore and dismiss this issue. See Mullenix, *supra* note 24.

C. THE SENATE'S PUBLIC POLICY ARGUMENT

The Senate Judiciary Committee, in acknowledging objections to "the congressional involvement in procedural reform that the bill represents,"²³⁸ indicated that its legislative initiative in the Civil Justice Reform Act was not inconsistent with the Rules Enabling Act, either as a matter of constitutional law or as a matter of policy.²³⁹ Thus, as a coda to its constitutional discussion, the legislative history to the Act also set forth a policy basis for assertion of congressional rulemaking authority.²⁴⁰

The Senate defensively rebutted any claim that "courts are exclusively suited to propose initiatives such as the Civil Justice Reform Act." The Senate based its policy argument instead on the proposition that users of the federal court system ought to have a say in the procedural rules that govern the system. Because "users" currently do not have a say in the rulemaking process,²⁴¹ it was the task of their democratically-elected representatives to give them that voice. The Senate reasoned that user-based rule reform could only be accomplished through legislation that re-delegates rulemaking authority to the users of the court, rather than to the judges.²⁴²

A second policy argument, somewhat related to the first, was that in amending the Rules Enabling Act in 1988, Congress intended to expand the opportunity for public comment on proposed rules.²⁴³ The current process, the Senate suggested, did "not fully allow for the extent of user involvement that has led to the Civil Justice Reform Act or that is contemplated for the advisory groups."²⁴⁴ This invocation of the recent amendment

238. S. REP. NO. 416, *supra* note 3, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6811.

239. *Id.*

240. *Id.* at 12-13, *reprinted in* 1990 U.S.C.C.A.N. at 6815-16. This section of the Senate Report is entitled "Strong policy reasons also argue in favor of the legislation." *Id.* at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6815.

241. Or so the Senate asserts, but see 28 U.S.C. §§ 2072-2074 (1988 & Supp. II 1990) (providing for enhanced public participation in the rulemaking process).

242. Senator Biden is quoted as stating that:

The users of the federal court system have no means other than through their democratically-elected representatives to express their dissatisfaction with the civil justice system and to demand reform of that system. For too long, we have ignored these cries for change, and this bill finally — and properly, in my view — acts upon their desires.

S. REP. NO. 416, *supra* note 3, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6815 (quoting June 26, 1990, Hearing Transcript, at 8)).

243. *Id.* at 12-13, *reprinted in* 1990 U.S.C.C.A.N. at 6815.

244. *Id.* at 13, *reprinted in* 1990 U.S.C.C.A.N. at 6815. In support of the

to the Rules Enabling Act rings hollow as far as demonstrating a policy of encouraging enhanced participation. Congress, for a legislative body so intent on reaching out to the citizenry to promulgate rules of civil procedure, was ironically quite exclusionary in the drafting process and the legislative hearings on the Civil Justice Reform Act.²⁴⁵ The Senate Judiciary subcommittee's own actions in promulgating this legislation suggest that the Senate seemed to favor participatory democracy more as a matter of convenience than principle.

The Senate's last policy argument was that Congress determined that there was a crisis in the federal courts characterized by excessive litigation costs and delay. Thus, there was a compelling need to address this situation, which involves basic policy issues. Legislation, the Senate concluded, was the appropriate means to address these problems and "the appropriate source of the policies is Congress, not the courts."²⁴⁶

In essence, the Senate's policy arguments may be reduced to two simple propositions, although perhaps the Senate would not state them so baldly: first, litigants are constituents, and second, procedural rulemaking is a substantive policy issue. Despite all the democratic rhetoric, these policy arguments represent good old-fashioned constituent politics, except that Congress has discovered a new interest group: people who are

proposition that the Rules Enabling Act should involve more extensive public participation, the Senate Report cites Professor Carrington, the current reporter for the Advisory Committee on Civil Rules: "The Rules Enabling Act was avowedly anti-democratic in the sense that it withdrew 'procedural' lawmaking from the political arena and made it the activity of professional technicians." *Id.*, reprinted in 1990 U.S.C.C.A.N. at 6815-16 (citing Carrington, *supra* note 213, at 310).

The Senate Report quotes Professor Carrington out of context and distorts his beliefs regarding the extent and desirability of public participation in the rulemaking process. First, Professor Carrington is describing the original version of the Rules Enabling Act and the philosophy of expertise that animated allocation of procedural rulemaking to the judicial branch. His statement has no bearing on the 1988 revision of the Rules Enabling Act, which provided for expanded public comment opportunities, and which Professor Carrington endorsed. *See generally*, Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) (discussing 1988 amendment to the Rules Enabling Act and the requirement of enhanced public participation in the rulemaking process). Second, although Professor Carrington supports expanded participation in rulemaking, I do not believe he advocates abandonment of the traditional role of the Advisory Committee on Civil Rules. *See id.*

245. *See supra* notes 94-95, 136-38 and accompanying text.

246. S. REP. NO. 416, *supra* note 3, at 13, reprinted in 1990 U.S.C.C.A.N. at 6816.

sued, and sued often.²⁴⁷

CONCLUSION

It is difficult to assess what is more disturbing about the Civil Justice Reform Act of 1990: the Act's requirement that each federal district court institute civil justice reform, or the process by which Congress enacted the legislation. The Act's legislative history consists of exclusion, distortion, omission, and disregard. Moreover, it is significant who Congress did or did not hear when it drafted this legislation: Congress's central preoccupation with protecting the special interests of business and insurance concerns supplied the bill's rationale that litigation costs impair the ability of American corporations to compete at home and abroad.

The Civil Justice Reform Act's central concept is that the system's "users" should be responsible for procedural rulemaking, but the Act itself was promulgated without any meaningful consultative review by the major users of the system. That federal judges were excluded from the Brookings-Biden task force and not consulted in promulgating this legislation is astonishing: apparently the Senate's definition of the system's users does not include the federal judges who sit and hear cases. Throughout the drafting and hearing process, the Senate excluded significant constituent voices and sponsored a systemic procedural reform that will effectively exclude certain types of litigants and cases.

Further, although the legislative history pays passing lip service to the proposition that cost and delay also impair the access of "middle class Americans" to the federal courts, it makes no reference to other affected strata of American society. These other users include poor people, discrimination victims, consumers, environmental and social activists, as well as tort victims who may have legitimate legal problems worthy of redress—in short, the people who are "clogging" the courts by

247. In particular, Congress, in the Civil Justice Reform Act, seems to be more interested in *certain kinds* of people who sue: to wit, big businesses, insurance concerns, and the like. These constituencies explain the legislative finding that the civil justice system impairs the ability of American businesses to compete in the world marketplace. See Hensler, *supra* note 28 (commenting on the political agenda underlying the civil justice reform movement). These constituencies also explain, to an extent, the composition of the Brookings-Biden Task Force and the witness roster for the legislative hearings on the Civil Justice Reform Act. See *supra* notes 94-95.

seeking to enforce substantive rights that business and insurance interests cannot repeal through substantive legislation.

Ultimately, what is so disturbing about the Civil Justice Reform Act is the blatant as well as disguised political agendas behind the legislation. The blatant agenda is to improve American business competitiveness domestically and abroad; the disguised political agenda is to remove disagreeable cases and disagreeable litigants from the federal courts. The blatant agenda is to allow local groups to create innovative procedural rules to enhance litigation efficiency; the disguised agenda is to foster certain kinds of procedural rules that will favor certain types of litigants. The blatant agenda is to "democratically" give procedural rulemaking authority to users of the system; the disguised agenda is to strip the judicial branch of its traditional rulemaking functions and transfer that function to unelected elite advisory groups dominated by business interests and corporate and insurance civil defense attorneys.

The witness who testified before the Senate judiciary committee that the Civil Justice Reform Act of 1990 was the legislative sleeper of the year was quite correct. The Act is the keystone measure in the late twentieth-century counter-revolution in procedural justice, a movement that is destined to strip away the procedural reforms accomplished through the 1938 Federal Rules of Civil Procedure. The transsubstantive philosophy of simplicity, uniformity, flexibility, and deliberative rulemaking that animated those rules not only has been rejected, but will be replaced with one of complexity, multiplicity, rigidity, and politicization. Procedural rules will be shaped to favor those groups with the most effective lobbyists in Congress or the local advisory groups.

Federal procedural rulemaking has for the past fifty years been counter-majoritarian and predicated on a model of expertise. But no one, to date, has persuasively argued why procedural rulemaking should be otherwise. The legislative history of the Civil Justice Reform Act invokes the rhetorical language of democratic ideology in place of reasoned argument for allocating procedural rulemaking to local amateur groups, but there are good empirical reasons for not wanting Congress to promulgate federal rules of civil procedure.²⁴⁸ As this Article points out, there are also equally compelling reasons for not wanting local amateur groups to do so either.

248. See Mullenix, *supra* note 8, at 843-55.

In a sense, the recent politicization of the rulemaking process has inspired a kind of parity debate as to relative legislative competencies of the branches of federal government to promulgate procedural rules. Congress's version of democracy, although speciously attractive, in the end will prove to be anti-democratic. A Congress that defines civil justice reform in terms of cost and delay, but leaves out justice, is surely suspect on the subject of democratic rulemaking.

Finally, the public and the legal community should keep in mind that Congress, in asserting an exclusive right over the rulemaking function, has declared all procedural rules to have substantive effect. All rules are, therefore, now legitimately within the ambit of congressional authority. Congress has, through the Civil Justice Reform Act, abolished the twilight area that existed between substance and procedure, and has perhaps ended civil procedure as we have known it for the past fifty years.